87-155

Supreme Court, U.S.
FILED
JUL 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. -

In the Supreme Court of the United States

OCTOBER TERM, 1987

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK),

Petitioner,

v.

LIEUT. THOMAS CUMMINGS, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

HARRY A. RISSETTO*
1800 M. Street, N.W.
Washington, D.C. 20036
ALLEN J. GROSS
KENNETH D. KLEINMAN
2000 One Logan Square
Philadelphia, PA 19103
HENRY H. PERRITT, JR.
Villanova Law School
Villanova, PA 19085
HAROLD HENDERSON
400 North Capitol Street, N.W.
Washington, D.C. 20001

Counsel for Petitioner

Of Counsel:
MORGAN, LEWIS & BOCKIUS

*Counsel of Record

SMITH-EDWARDS-DUNLAP COMPANY, 2867 E. ALLEGHENY AVENUE, PHILADELPHIA, PA 19134 (215) 425-8800

QUESTIONS PRESENTED

Does a state court have jurisdiction over railroad employees' breach of contract claims where the National Railroad Adjustment Board had previously considered and rejected the identical claims?

Does the Railway Labor Act preempt a state court action based on alleged individual employment agreements in conflict with a collective bargaining agreement?

PARTIES TO THE PROCEEDING[1]

Petitioner National Railroad Passenger Corporation (Amtrak) respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered in this proceeding on March 30, 1987.

The Respondents are Lieut. Thomas Cummings, Lieut. John Gallagher, Lieut. Ronald Stachowski, Lieut. William Boland, Lieut. Stephen McGovern, Lieut. John Ryan, Lieut. Kurt Kemmessies, Lieut. Michael Amico, Sgt. Neville Booth, Lieut. Michael Serfess, Lieut. Lawrence Clark, Lieut. John Riggin, Lieut. Harold Plude, Lieut. Robert Slimbock, Lieut. Harry Halbe, Lieut. John Griffin, Sgt. Vaughn Carver, Sgt. Charles Yager, Sgt. Gerald Adams, Sgt. Stephen Warner, Sgt. Carl Gustafson, Sgt. Richard Yost, Sgt. Robert Crowley, Sgt. Frank Rapinesi, Sgt. Robert Coulson.

RULE 28.1 LIST

Petitioner has no parent companies, subsidiaries which are not wholly owned or affiliates to disclose pursuant to Rule 28.1 of the Rules of the Supreme Court.

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1. The parties before the Court are identical to the parties to the proceedings below.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

The petitioner National Railroad Passenger Corporation (Amtrak) (hereinafter "Amtrak" or "Petitioner") respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Pennsylvania, entered in this proceeding on March 30, 1987.

CITATION OF OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania has been reported at __ Pa. __, 523 A.2d 338 (1987) and is included within the Appendix for Petitioner submitted herein, commencing at page A-1. The opinion of the Superior Court of Pennsylvania has been reported at 343 Pa. Super. 137, 494 A.2d 393 (1985) and is included within the Appendix for Petitioner commencing at Page A-13. The Opinion and

Order of the Court of Common Pleas of Delaware County have not been reported and appear in the Appendix for Petitioner, commencing at page A-28. The orders and opinions of the National Railroad Adjustment Board (NRAB), Fourth Division, on the statements of claim filed by Respondents are included within the Appendix for Petitioner, commencing at page A-40.

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on March 30, 1987. The jurisdiction of this Court is invoked pursuant to Section 1257(3) of Title 28, United States Code.

STATUTORY PROVISIONS INVOLVED

Railway Labor Act, 45 U.S.C. § 151a, as amended, c. 691, § 2, June 21, 1934, 48 Stat. 1186, provides:

> General purposes
>
> The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

Railway Labor Act, 45 U.S.C. § 153, as amended Pub. L. 91-234, §§ 1-6, April 23, 1970, 84 Stat. 199, 200, provides *inter alia*:

National Railroad Adjustment Board

First. Establishment; composition; powers and duties; divisions; hearings and awards; judicial review

There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided—. . .

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes. . . .

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute. . . .

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the

petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

Labor Management Relations Act, 1947, 29 U.S.C. § 185, c. 120, Title III, § 301, June 23, 1947, 61 Stat. 156, provides, *inter alia*:

Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

Respondents, who held temporary positions as Sergeants and Lieutenants in the Petitioner's Police Department, were subject to the collective bargaining agreement between Amtrak and Local Union 732 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America. The collective bargaining agreement, which was in place prior to Respondents' hire, set forth, *inter alia*, the exclusive procedure for the selection and promotion to Sergeant and Lieutenant positions. Pursuant to that agreement, Amtrak scheduled promotional examinations which Respondents refused to take, alleging that they had been promised that their positions were permanent. Although Respondents initially procured temporary injunctive relief from the United States District Court for the Eastern District of Pennsylvania that delayed the examinations, the District Court ultimately vacated its injunction and permitted the examinations to be held. (A-60).

Thereafter, Amtrak began to implement its agreement with Local 732, and promoted officers in accordance with the results of the promotional examination. Because Respondents refused to take the examination, they were demoted.

Respondents sought to enjoin their demotions in a second action filed in the United States District Court for the Eastern District of Pennsylvania. After a hearing, the District Court dismissed the action on the grounds that Respondents' dispute related to the promotional provisions of the collective bargaining agreement and, therefore, was a "minor dispute" under the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, ("RLA"), over which the National Railroad Adjustment Board ("NRAB"), and not the courts, had exclusive jurisdiction. (A-53).

Thereafter, Respondents filed statements of claim with the NRAB asserting that they were improperly demoted and that they were hired into permanent supervisory positions. They sought reinstatement to their former supervisory positions and full backpay.

The NRAB issued three decisions with respect to Respondents' claims. (A-40). In these decisions, the NRAB found that it had jurisdiction over the disputes and that Amtrak correctly had applied the promotional provisions of the collective bargaining agreement. The NRAB further concluded that the holdings in *J.I. Case v. N.L.R.B.*, 321 U.S. 332 (1944), and *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342 (1944), require that a collective bargaining agreement must take precedence over contracts with individual employees. Accordingly, the NRAB denied Respondents' claims.

Following the NRAB's decision upholding their demotion, Respondents ignored the statutory directive of Section 153 of the RLA granting the federal district courts sole jurisdiction to review NRAB decisions. Instead, Respondents filed a third breach of contract action in the Court of Common Pleas of Delaware County, pursuing the identical claim which they brought before the federal court and the NRAB, *i.e.*, that Respondents had been hired into permanent supervisory positions and could not be demoted. In response to Amtrak's Exceptions to the court's verdict in favor of Respondents, the court set aside the judgment, holding that it lacked subject matter jurisdiction over the action. Respondents then petitioned the United States District Court for the Eastern District of Pennsylvania for Review of the Order of the NRAB, which Petition Respondents later voluntarily dismissed. On Application for Reconsideration to the Court of Common Pleas, a three-judge panel of the same court reaffirmed its Order sustaining Amtrak's Exceptions. (A-26). On appeal to the Superior Court of Pennsylvania, the court unanimously affirmed the Common Pleas Court holding that the court lacked subject matter jurisdiction over the Complaint. (A-25).

The Pennsylvania Supreme Court reversed. Relying upon *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983), a case arising under the National Labor Relations Act ("NLRA"), the court held that the individual contracts could be enforced separately from the collective bargaining agreement and that the common law claims were not preempted by the RLA.

REASONS FOR GRANTING THE WRIT

A. Introduction

This case involves jurisdictional and substantive issues of public importance under the RLA: whether railroad employees covered by a collective bargaining agreement may overturn a decision of the National Railroad Adjustment Board ("Adjustment Board"), by enforcing state law claims based on individual agreements that conflict with the collective agreement. If the decision of the state court below is permitted to stand, Amtrak respectfully submits that the comprehensive federal regulatory scheme which vests mandatory and exclusive jurisdiction over such minor disputes in railroad adjustment boards will be jeopardized. This result would be in direct conflict with well-established decisions of this Court, and the language and legislative history of the RLA.

In upholding state court jurisdiction over railroad employees' individual breach of contract claims, the Pennsylvania Supreme Court ignored numerous decisions of this Court and several United States courts of appeal that have held that the decisions of the statutory adjustment boards, based on their exclusive and mandatory jurisdiction, may not be collaterally challenged in state court. The Pennsylvania Supreme Court based its decision on a misapplication of the preemption analysis in *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983). As the Court has held, the particular preemption analysis used in *Belknap* is not appropriate outside the context of a challenge to the National Labor Relations Board's ("NLRB") primary jurisdiction. The state court below ignored the appropriate preemption analysis set out by this Court in *Allis-Chalmers v. Lueck*, 471 U.S. 202 (1985). The reasoning of *Allis-Chalmers*, when considered with the Court's admonition against enforcing individual agreements inconsistent with collective agreements in *J.I. Case v. N.L.R.B.*, 321 U.S. 332, and *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, mandates that the Pennsylvania Supreme Court's decision cannot stand because it is in conflict with national labor policy. This case directly addresses the question

left open by the recent decision of the Court in *Caterpillar, Inc. v. Williams*, __ U.S. __, 107 S. Ct. 2425 (1987); namely, may a state court find that individual agreements in conflict with a collective agreement are not preempted by federal labor law?

Accordingly, this Court should review the decision of the Supreme Court of Pennsylvania and, upon review, reverse that decision.

B. The Pennsylvania Court's Decision Ignored Established Supreme Court Precedent by Deciding a State Law Claim Identical to that Considered and Rejected Under the Exclusive Dispute Resolution Mechanism of the Railway Labor Act.

In *Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711 (1945), this Court, after extensively reviewing the language and legislative history of the Railway Labor Act, held that so-called "minor disputes" between carriers and individual employees covered by a collective bargaining agreement, relating to specific grievances arising out of the employment relationship, may only be submitted for final and binding determination to an Adjustment Board created by the RLA. The Court specifically found that the administrative process was made mandatory by congressional amendments to the Act in 1934 "to safeguard the public as well as private interests against the harmful effects of the preexisting scheme" under which voluntary boards had produced only deadlocks and "stagnation". *Id.* at 727-28. Five years later, the Court held that resort to an Adjustment Board was not only mandatory under the Railway Labor Act, but was also exclusive, thereby ousting state and federal courts from jurisdiction over these minor disputes. *Slocum v. Delaware, Lackawanna and Western R.R. Agency*, 339 U.S. 239 (1950); *Order of Railway Conductors of America v. Southern Ry.*, 339 U.S. 255 (1950).

Since these decisions, the Court has frequently revisited the language and legislative history of the RLA, and repeatedly upheld the mandatory and exclusive jurisdiction of Ad-

justment Boards against encroachment by both state and federal courts. *Andrews v. Louisville & Nashville R.*, 406 U.S. 320 (1972); *Pennsylvania R.R. v. Day*, 360 U.S. 548 (1959). As a corollary to this important federal regulatory principle, the Court has not permitted state or federal courts to reconsider decisions of the Adjustment Boards, except on direct appeal to federal court and then only on specified narrow grounds. *Union Pacific R.R. v. Sheehan*, 439 U.S. 89 (1978); *Gunther v. San Diego & Arizona Eastern Ry.*, 382 U.S. 257 (1965); *Union Pacific R.R. v. Price*, 360 U.S. 601 (1959).

In the instant case, the Adjustment Board denied the identical employee claims upheld by the Pennsylvania Supreme Court. By permitting the railroad employees subsequently to challenge their demotions under state law, the court below overturned a final and binding decision of the NRAB, and ignored the carefully constructed federal scheme vesting mandatory and exclusive jurisdiction over the employees' claims in the Board. Because the decision of the Pennsylvania Supreme Court is in conflict with national railroad labor policy and both the decisions of this Court and the various federal courts of appeal, the decision is appropriate for review on a Writ of Certiorari, and should be reversed.

1. The court below impermissibly adjudicated the identical claims that the Adjustment Board considered and rejected.

In its decision, the Pennsylvania Supreme Court acknowledged that the employees' dispute submitted to the Board over their demotions was "minor," *Cummings v. National Railroad Passenger Corp.*, 523 A.2d 338, 340 & n.4 (1987) (A-5). Nonetheless, the court below found that the decision of the Board did not affect the court's right to rule on these claims, because the Board "did not . . . address" the separate contract claims under state law. *Id.* at 344 (A-12). Contrary to the opinion of the court below, however, the Adjustment Board *did* consider and reject the identical claims presented by the employees in the instant case. By exalting the form of pleading over the substance of the claims, the

court below effectively overturned the Board's decision, in contravention of the specific dictates of the RLA and this Court.

Prior to filing the instant action, Respondents filed statements of claim with the Adjustment Board in which they contested their demotions on the grounds that:

> The employees contend that they were hired into permanent supervisory positions, not subject to demotion and subject only to promotion during the faithful performance of their duties. The employees claim entitlement to reinstatement into the supervisory positions which they formerly held, with full reimbursement for all back pay that they have lost as a consequence of their demotion.

Opinion of NRAB (A-40). In their state court Complaint, Respondents made virtually the identical allegations, that they were hired into permanent, high ranking positions, and that they were wrongfully "demoted to the rank of patrolman," thereby incurring a loss of salary and fringe benefits.

In rendering its decision rejecting the employees' claims, the Adjustment Board considered the provisions of the collective bargaining agreement governing promotions, as well as the employee's contentions that they had been individually promised supervisory positions. The Board specifically found that the collective bargaining agreement superseded the individual agreements, and held that Amtrak acted properly in demoting the employees. Opinion of NRAB (A-43). Thus, after the employees had full opportunity to present their position, with representation of counsel, their demands for promotions and back pay based on their individual agreements were denied by the Board. *Id.* This decision was "final and binding". 45 U.S.C. §153 First (m).

Despite this "final and binding" decision of the Adjustment Board, the court below considered the identical claims rejected by the Board and ordered payment of back pay and fringe benefits. By so holding, the court below ignored this Court's specific holding that the clear language and legislative

history of the RLA prohibits subsequent resort to a common law remedy after an adverse determination by an Adjustment Board, *Union Pacific R.R. v. Price*, 360 U.S. at 608-9, 616-17. Instead, the Pennsylvania Supreme Court found that the decision of the Adjustment Board did not affect the state court's consideration of the employees' claims, reasoning that the Board decision only prohibited reinstatement and not a state law claim for damages. Accordingly, the court below held that the state claims could proceed independently, because they had no impact on the collective bargaining agreement or on other employees. *Cummings v. National Railroad Passenger Corp.*, 523 A.2d at 343 (A-11).

The reasoning of the state court below permitted the railroad employees to ignore the express provisions of a collective bargaining agreement and the mandatory jurisdiction of the Adjustment Board. As a result, an actual decision of the Board became no more than an "advisory opinion"—precisely the result condemned by this Court in *Union Pacific R.R. v. Price*, 360 U.S. 601. The Pennsylvania Supreme Court's specious distinction between damages and equitable relief attempts to resurrect the holding of *Moore v. Illinois Central R.*, 312 U.S. 630 (1941), in which this Court decided an employee could pursue a state law claim for damages so long as he was not seeking reinstatement. *Moore* was expressly overruled by *Andrews v. Louisville & Nashville R.*, 406 U.S. 320, based on the Court's recognition that the failure to seek equitable relief does not remove a minor dispute from the jurisdiction of the Adjustment Board. Indeed, federal courts of appeal have frequently held that the Adjustment Board has jurisdiction over claims for money damages based on the employment relationship, even if such damages cannot be awarded by the Board, as in claims for intentional infliction of emotional distress. *Choate v Louisville & Nashville R.*, 715 F.2d 369 (7th Cir. 1983) (intentional infliction of emotional distress claim within Board of Adjustment jurisdiction); *Beers v. Southern Pacific Transp. Co.*, 703 F.2d 425 (9th Cir 1983) (same); *Goclowski v. Penn Central Transp. Co.*, 571 F.2d 747 (3d Cir.

1977) (damage claim as well as injunction claim must be presented to the Board of Adjustment).

The federal regulatory scheme which provides for mandatory administrative resolution of minor disputes would be disrupted, if the decision below were permitted to stand. Congress and this Court long ago decided that the federal interests in preserving the free flow of interstate commerce mandate that minor disputes be kept within the Adjustment Boards and "out of the courts." *Union Pacific R.R. v. Sheehan*, 439 U.S. at 94.

Permitting state court litigation of claims rejected by the Board of Adjustment could undermine the balance between individual and collective rights under the RLA, developed over fifty years, and founded upon the final and binding nature of awards of Adjustment Boards, which have mandatory and exclusive jurisdiction over minor disputes. The specialized expertise of the Boards and the need for such mandatory and uniform dispute resolution mechanisms to ensure industrial peace expressly recognized by Congress and this Court, *see Gunther v. San Diego Arizona Eastern Ry*, 382 U.S. 257, may become trampled by an entirely new class of litigants seeking relief under the common law of fifty states, should other courts accept the conclusion of the state court below. This result has been specifically condemned by Congress and this Court and therefore, the Court should grant the Petition for a Writ of Certiorari upon this question.[2]

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2. This result is not affected by the Court's recent decision in *Caterpillar, Inc. v. Williams*, ___ U.S. ___, 107 S. Ct. 2425 (1987), where the Court held that state law claims pursuant to individual agreements may not be removed to federal court on the basis of "complete preemption" created by the existence of a collective agreement under the NLRA. Noting that the state law claims were independent from the collective agreement, the Court found that the national labor policy favoring arbitration was not affected, for such disputes were not arbitrable. *Id.* at 2433 n.15. Here, not only were the employees' claims subject to the jurisdiction of the Adjustment Board, but the Board exercised such jurisdiction and rejected the employees' claims. Thus, the national labor policy underlying the RLA would be adversely affected, should the employees' claims be permitted to go forward in state court.

2. The court below could not entertain claims subject to the exclusive jurisdiction of the Adjustment Board.

Even if the employees had not pursued a remedy before the Adjustment Board, the RLA, as interpreted by many decisions of the Court and various courts of appeal, precluded consideration of the employees' claims of improper demotion by the state court. Because the Board has mandatory and exclusive jurisdiction over all such employment disputes, the Pennsylvania Supreme Court lacked jurisdiction to consider the employees' claims. *Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. at 723.

The Pennsylvania Supreme Court erroneously premised its jurisdiction upon a finding that the employees had individual agreements which were "separate from," albeit in conflict with, the applicable collective bargaining agreement. *Cummings v. National Railroad Passenger Corp.*, 523 A.2d at 343. (A-11). The court held that the Adjustment Board had "no interest in" consideration of the employees' state law claims, because the employees' individual agreements, rather than the collective agreement, were at issue. *Id* (A-10).

Although professing to consider the federal interest in the "maintenance of the flow of interstate commerce by promoting meaningful collective bargaining and protecting employees' rights under collective bargaining agreements," *Id.* at 343 (A-11), the Pennsylvania Supreme Court's decision is in direct conflict with the holding of this Court and the federal courts of appeal, that the jurisdiction of the Adjustment Board is not limited to specific provisions of a collective bargaining agreement, but instead extends to any claim that is "founded upon some incident of the employment relationship," including those "independent of the collective agreement." *Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. at 723. Indeed, the federal courts of appeal have long held that any claim with a "not insubstantial" or "arguable" relationship to the collective agreement is subject to the mandatory and exclusive jurisdiction of the Adjustment Boards. *See, e.g., Magnuson v. Bur-*

lington Northern Inc., 576 F.2d 1367, 1369-70 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978); *United Transportation Union v. Penn Central Transp. Co.*, 505 F.2d 542, 544-45 (3d Cir. 1974); *United Transportation Union v. Baker*, 482 F.2d 228, 230 (6th Cir. 1973); *Railway Express Agency v. Brotherhood of Railway, Airline & Steamship Clerks*, 459 F.2d 226, 231 (5th Cir.), *cert. denied*, 409 U.S. 892 (1972).

Despite the broad jurisdiction of the Adjustment Board and the specific provision in the collective bargaining agreement dealing with the precise issues of promotion covered by the employees' individual agreements, the Pennsylvania Supreme Court held that the Adjustment Board "could not address" the employees' claims. *Cummings v. National Railroad Passenger Corp.*, 523 A.2d at 344 (A-10). This conclusion that the Adjustment Board lacked jurisdiction to consider the employees' claims was rejected by Judge McGlynn of the Eastern District of Pennsylvania, who, prior to the commencement of the instant action, refused to consider these same employees' claims, because they were "minor disputes". *Slimbock v. National Railroad Passenger Corp.*, No. 78-1662 & 77-3133 (E.D. Pa. May 16, 1978) (A-54). Moreover, this Court and a number of federal courts of appeal have also rejected the conclusion that the Adjustment Board may not consider individual agreements in conflict with a collective agreement, for such disputes have been consistently remanded to the Adjustment Boards. *See Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, (Adjustment Board has jurisdiction to determine whether collective agreement supersedes individual agreements); *Chambers v. Burlington Northern Inc.*, 692 F.2d 109 (10th Cir. 1982) (effect of collective bargaining agreement on pre-existing individual contract was a minor dispute subject to the Adjustment Board); *McKinney v. International Association of Machinists*, 624 F.2d 745 (6th Cir. 1980) (state court action based on pre-employment promises of promotion considered a minor dispute subject to the Adjustment Board); *Brown v. American Airlines, Inc.*, 593 F.2d 652 (5th Cir. 1979) (individual settlement agreement cannot be enforced outside the exclusive jurisdiction of the Adjust-

ment Board). Thus, the decision of the Pennsylvania Supreme Court is in direct conflict with the decisions of the federal courts.

The court below's finding that the Board "could not address" the employees' state law claims also conflicts with the federal statutory scheme because the state court lacked jurisdiction to determine the scope of the Board of Adjustment's jurisdiction. It is up to the Board of Adjustment, in the first instance, to determine its jurisdiction, with only a narrow review by federal courts based on the three limited criteria of Section 3 of the RLA. 45 U.S.C. § 153 First (q).[3] Neither federal nor state courts may prescreen disputes potentially subject to resolution by the Adjustment Board, "a congressionally designated agency peculiarly competent in this field." *Order of Railway Conductors of America v. Pitney*, 326 U.S. 561, 567-68 (1945); *Brown v. American Airlines, Inc.*, 593 F.2d at 654 n.3 ("the existence and validity of the settlement agreement are matters which must be taken initially before the Board"). Once it was clear that the dispute was founded on some incident of the employment relation, the state court below could not arrogate jurisdiction to decide that the Board of Adjustment could not consider the issue; Congress and this Court have stated that such determination is for the Board.

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3. Section 153 First (q) of the RLA provides, *inter alia*:

If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. . . . On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

The failure of the court below to recognize that jurisdiction over the employees' claims existed only in the Adjustment Board presents a clear conflict with national railroad labor policy and the decisions of this Court. Accordingly, Certiorari is appropriate to review this decision, which should be reversed.

C. The Pennsylvania Supreme Court Mistakenly Failed to Apply this Court's Preemption Analysis in *Allis-Chalmers v. Lueck* and Misapplied the Court's Decisions in *Belknap v. Hale* and *J.I. Case v. NLRB.*

In enforcing the railroad employees' individual contract rights notwithstanding the collective bargaining agreement and the decision of the Adjustment Board, the Pennsylvania Supreme Court relied heavily on this Court's decision in *Belknap, Inc. v. Hale*, 463 U.S. 491. That case utilized the preemption analysis of *San Diego Building Trades v. Garmon*, 359 U.S. 236 (1959), to hold that promises of permanent employment made to replacements for striking employees may be enforced in state court without interfering with the jurisdiction of the NLRB. By premising its decision on *Belknap*, the court below ignored the fundamental distinctions between the RLA and the NLRA. In addition, the court also ignored the more appropriate preemption analysis utilized by the Court in *Allis-Chalmers v. Lueck*, 471 U.S. 202, which this Court has held must be considered in cases where a state law claim may interfere with a collective bargaining agreement, as opposed to the jurisdiction of the NLRB. Indeed, in *Allis-Chalmers*, this Court specifically held that the *Garmon* preemption analysis was irrelevant to such a case. 471 U.S. at 213-14 n.9.

By relying upon the wrong preemption doctrine and an inapplicable decision of this Court, the state court below also misapplied this Court's decision in *J.I. Case v. N.L.R.B.*, 321 U.S. 332, by holding that individual agreements *could* supersede collective agreements so long as the individual agreements were entered into upon commencement of employ-

ment. Such a legal conclusion goes well beyond this Court's holding in *Caterpillar, Inc. v. Williams*, 107 S. Ct. at 2431, that individual agreements are not necessarily subsumed into collective agreements by reason of *J.I. Case*, for the contracts at issue here were in direct conflict with the collectively bargained contract. Thus, the preemption question reserved to a state court by this Court in *Caterpillar* was addressed here by the Pennsylvania Supreme Court, with a result in conflict with *J.I. Case* and several decisions of the federal courts of appeal. *See, e.g., Eitmann v. New Orleans Public Service*, 730 F.2d 359 (5th Cir.), *cert. denied*, 469 U.S. 1018 (1984) (state law action to enforce pre-hire promise to bargaining unit employee preempted by NLRA). Accordingly, Amtrak respectfully submits that its Petition should be granted, so that this Court may clarify the relationship between *Belknap*, *Allis-Chalmers*, *J.I. Case*, and *Caterpillar* in the RLA context, and resolve conflicts between the Pennsylvania Supreme Court's decision and decisions of this Court, and among the various federal courts of appeal.

1. *Belknap* does not apply to Railway Labor Act disputes involving collective bargaining agreements.

In *Belknap v. Hale*, this Court held that the NLRA did not preempt state law claims to enforce promises of permanent employment made to strike replacements who were terminated upon settlement of the strike. The decision was predicated upon an analysis of *San Diego Building Trades v. Garmon*, which required the Court to determine whether the state law claims concerned conduct either protected or prohibited by the NLRA, as administered by the NLRB.[4] In

4. The Court also analyzed the effect of a second preemption doctrine, announced in *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976), relating to whether Congress had intended to leave the area unregulated. There is no question that Congress intended to regulate employment disputes under the RLA, and the court in the instant case acknowledged the inapplicability of the *Machinists* preemption doctrine herein. *Cummings v. National Railroad Passenger Corp.*, 523 A.2d at 342 n.10 (A-9).

upholding the replacements' state law claims, the Court found that the state's interest in protecting against misrepresentations outweighed any potential interference with the federal scheme, because the replacements were "innocent third parties" with no recourse to the NLRB. *Belknap v. Hale*, 463 U.S. at 500, 510-11.

In *Belknap*, the state court could not interfere with the NLRB processes, because the NLRB had no jurisdiction to address the employees' claims. In the instant case, the opposite is true, for the state court decision conflicts with the plenary jurisdiction of the Board of Adjustment under the RLA. Nonetheless, the Pennsylvania Supreme Court erroneously held that the instant case was "analogous to *Belknap*" because the Adjustment Board had no more interest in the employees' state law claims than the NLRB had in *Belknap*. *Cummings v. National Railroad Passenger Corp.*, 523 A.2d at 341 (A-10). While acknowledging that the RLA and the NLRA differed in "implementation and mechanics," the court below held that such differences were "not material to the matter before us" because "the basic purposes and policy of the two statutes are the same." *Id.* (A-6-7). Consequently, the court below found that *Belknap* supported its decision to exercise jurisdiction over the employees' state law claims.

By applying *Belknap*, which arose under the NLRA, to the instant matter controlled by the RLA, the Pennsylvania Supreme Court ignored this Court's admonition that "the National Labor Relations Act cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes." *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383 (1969). *See, e.g., Burlington Northern R.R. v. Brotherhood of Maintenance of Way Employees*. ___ U.S. ___, 107 S. Ct. 1841 (1987) (under RLA, railroad may not seek injunction against secondary boycott picketing, unlike the NLRB under the NLRA).

Far from being "not material," as stated by the court below, the differences between the two statutes mandate that

the analysis utilized by the Court in *Belknap* is simply inapplicable under the RLA. *Belknap* was premised upon the limited authority of the NLRB only to adjudicate unfair labor practices; because the strike replacements had no recourse to the NLRB, there could have been no interference with NLRB processes. By contrast, the RLA provided Respondents the right to have their dispute fully adjudicated before the Adjustment Board—the forum mandated by the RLA to hear all railroad employer-employee disputes arising out of the employment relationship. *Andrews v. Louisville & Nashville R.*, 406 U.S. 320. In *Belknap*, the Court reasoned that the state court actions could be maintained independently from NLRB proceedings because a state court could focus on the rights of replacements, while the NLRB could only focus on the rights of striking employees, *Belknap v. Hale*, 463 U.S. at 510. Such reasoning is inapplicable here, where the same employees brought the identical claims rejected by the Adjustment Board into state court. Indeed, even the considerations relating to the peculiarities of economic pressures during strikes and the "free play of economic forces" under the NLRA, *Machinists v. Wisconsin Employment Relations Comm.*, 427 U.S. at 140, which played a prominent role in the Court's analysis in *Belknap*, is irrelevant here, because no strike was involved, and the RLA provides a far different mechanism for the resolution of strikes over "minor disputes". *See Railroad Trainmen v. Chicago River & Ind. R.*, 353 U.S. 30 (1957) (strikes over minor disputes may be enjoined); *Cummings v. National Railroad Passenger Corp.*, 523 A.2d at 342 n.10 (A-9) (recognizing the difference between the NLRA and the RLA with regard to work stoppages).

The court below erroneously imported provisions of the NLRA into a dispute under the RLA, by misinterpreting and misapplying the decision of this Court in *Belknap v. Hale*. Fundamental national labor policy requires that the courts respect Congress' decision to establish a different federal regulatory scheme for the railroad and airline industry under the RLA than for other employers under the NLRA. Amtrak respectfully submits that Certiorari shall be granted to review

the instant case, to clarify the boundaries of *Belknap* and to correct the erroneous extension of that decision by the Pennsylvania Supreme Court.

2. The Pennsylvania court did not reference the most analogous NLRA preemption criteria—those set out by this Court in *Allis-Chalmers*.

To the extent the state court below could have used a decision under the NLRA as guidance under the RLA, the proper preemption analysis was that governing breach of contract actions under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), as described by this Court in *Allis-Chalmers v. Lueck*, rather than the preemption analysis used to protect the primary jurisdiction of the NLRB, utilized in *Garmon* and *Belknap*. Indeed, this Court has repeatedly cautioned lower courts to avoid such confusion. *Brown v. Hotel and Restaurant Employees*, 468 U.S. 491, 502 (1984); *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. at 383 n.19. As the Court noted in *Allis-Chalmers v. Lueck*,

> So-called *Garmon* pre-emption involves protecting the primary jurisdiction of the NLRB, and requires a balancing of state and federal interests. The present tort suit would allow the State to provide a rule of decision where Congress has mandated that federal law should govern. In this situation the balancing of state and federal interests required by *Garmon* pre-emption is irrelevant, since Congress, acting within its power under the Commerce clause, has provided that federal law must prevail.

471 U.S. at 214 n.9. Because the Pennsylvania Supreme Court utilized the *Garmon* balancing test in a case that involved the relationship between individual and collective agreements, rather than the primary jurisdiction of the NLRB, the decision below is contrary to the well-established preemption principles explained by the Court, and should not stand.

In *Allis-Chalmers v. Lueck*, the Court found that a state law claim for bad faith handling of disability benefits provided

under a collective bargaining agreement was preempted by § 301, because the state law claim was "inextricably intertwined" with the collective agreement. *Id* at 213. In light of the need for a uniform federal labor law, and the agreement between the parties to utilize a collectively bargained grievance and arbitration procedure, the Court did not restrict the pre-emptive effect of § 301 solely to alleged violations of specific contract violations, but required that " 'the relationships created by [a collective bargaining agreement]' be defined by application of 'an evolving federal common law grounded in national labor policy' ". *Id* at 210-11 (*quoting Bowen v. United States Postal Service*, 459 U.S. 212, 224-25 (1983)). Thus, in *Allis-Chalmers*, a state tort claim was deemed impermissible because adjudication of the state claim would require interpretation of collectively bargained rights, and would involve the "same suit" that should have been submitted to arbitration. 471 U.S. at 219.[5]

As in *Allis-Chalmers*, the instant case presents the issue of the preemptive effect of a collective agreement, and a statutory mechanism to enforce the agreement, upon employees' state law claims relating to their employment. Resolution of the employees' claims would require an analysis of the collective agreement to determine the effect of the individual agreements on the collective agreement and the appropriate remedy. Several courts of appeal have adopted this precise reasoning under the NLRA in finding that employees' state law claims based on pre-hire representations of permanent employment are preempted by a collective agreement, because the state law claims could not be meaningfully sepa-

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5. This analysis was utilized by the Court again in *International Brotherhood of Electrical Workers v. Hechler*, ___ U.S. ___, 107 S. Ct. 2161 (1987), where the Court found that a state law claim against a union for failure to ensure a safe workplace was intertwined with the collective bargaining agreement and therefore was preempted by federal law. In *Caterpillar, Inc. v. Williams*, the Court noted that individual agreements which were not founded upon a collective bargaining agreement might not be preempted under the NLRA, but specifically stated that the merits of the preemption question must be decided first by the state court. 107 S. Ct. at 2433 n.13.

rated from the collective agreement. *Bale v. General Telephone Co. of California*, 795 F.2d 775 (9th Cir. 1986); *Eitmann v. New Orleans Public Service*, 730 F.2d 359 (5th Cir.), *cert. denied*, 469 U.S. 1018 (1984). As has been noted by this Court, the argument in favor of preemption is even stronger under the RLA, under which the exclusive administrative procedures are statutorily required, than under the NLRA, which contemplates privately bargained dispute resolution mechanisms. *Andrews v. Louisville & Nashville R.*, 406 U.S. at 323.[6]

The preemptive effect of the collective agreement on the employees' claims herein is strengthened even further by the actual consideration, and rejection, of the employees' grievances by the Adjustment Board. The Pennsylvania Supreme Court failed to consider the appropriate preemption analysis of *Allis-Chalmers* in light of both the provisions of the collective agreement and the decision of the Adjustment Board—a failure which is inconsistent with the decisions of this Court and various courts of appeal. Amtrak respectfully submits that Certiorari is appropriate to ensure proper application of *Allis-Chalmers* within the Railway Labor Act context.

3. The Pennsylvania court incorrectly decided the issue of preemption left open in *Caterpillar v. Williams*, by failing to recognize that *J.I. Case* precludes individual employment contracts which conflict with collective agreements.

This Court has recognized that national labor policy is premised upon majority representation of employees by their elected union representative, the result of which "extinguishes the individual employee's power to order his own relations with his employer . . . [therefore] only the union may

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6. Moreover, the NLRA "inextricably intertwined" test described in *Allis-Chalmers* is less likely to produce a preemption conclusion than the applicable standard adopted by the various Courts of Appeals under the RLA, *i.e.* that the conduct at issue bear an "arguable" or "not insubstantial" relationship to the collective agreement. *See, e.g., Magnuson v. Burlington Northern Inc.*, 576 F.2d at 1369-70.

contract the employees terms and conditions of employment. . . ." *N.L.R.B. v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967); *J.I. Case v. N.L.R.B.*, 321 U.S. 332, 339 (1944). This fundamental policy was contravened in the instant case by the Pennsylvania Supreme Court, which upheld individual promises of promotion despite a conflicting provision in the collective bargaining agreement, simply because the alleged promises were made upon commencement of employment, *Cummings v. National Railroad Passenger Corp.*, 523 A.2d at 343 n.12. (A-11). This decision thus decided the preemption issue expressly left open by the Court in *Caterpillar v. Williams*, and exceeded the boundaries of *J.I. Case* as interpreted by this Court in *Caterpillar*.

In *J.I. Case v. N.L.R.B.*, the Court held that individual agreements which are inconsistent with collective bargaining agreements cannot be specifically enforced, or else "the [NLRA] would be reduced to a futility." 321 U.S. at 337. While not rejecting individual contracts that had no impact on the collective agreement, the Court emphasized nonetheless that "the employer may not incidentally exact or obtain any diminution of his own obligation or any increase of those of employees in the matters covered by collective agreement." *Id.* at 339.[7] In a companion decision to *J.I. Case*, *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, the Court applied those identical principles to the RLA.

As shown by *J.I. Case*, national labor policy long ago established that when employees have designated a union as

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7. Indeed, the Court noted that individual agreements could not supersede collective agreements even where the individual agreement is more beneficial to the employee, for

> advantages to individuals may prove as disruptive of industrial peace as disadvantages. They are a fruitful way of interfering with organization and choice of representatives; increased compensation, if individually deserved, is often earned at the cost of breaking down some other standard thought to be for the welfare of the group, and always creates the suspicion of being paid at the long-range expense of the group as a whole.

Id. at 338-39.

their representative, individual decision-making must be subordinated to collective action. The grievance procedure is an extension of the collective bargaining process, for it ensures the integrity of the parties' agreements. To allow an employee to circumvent the grievance procedure's reconciliation of individual and collective rights by proceeding in state court threatens the collective bargaining process itself. There can be no dispute that the individual agreements in the instant case squarely conflict with the collective bargaining agreement provision on promotional processes, as found by the Adjustment Board in its decision (A-43). Yet these agreements were permitted to supersede the collective agreement in clear contravention of federal labor policy and the decisions of this Court. *Brotherhood of Railway & Steamship Clerks v. Florida East Coast Ry.*, 384 U.S. 238, 246 (1966). The Pennsylvania Supreme Court erroneously construed this national policy to permit such individual agreements where the promises are made upon the commencement of employment, despite the lack of any federal court precedent under the RLA for such a distinction and significant countervailing authority opposing it.

The recent decision of the Court in *Caterpillar, Inc. v. Williams*, does not modify the law in this regard. In that case, the Court held that state court actions based on individual promises of indefinite employment could not be removed to federal court on the basis of preemption under the NLRA. The Court found that *J.I. Case* did not render the state law claims federal in character, and thus removable under the "complete preemption" doctrine, because the claims were not automatically subsumed into, or eliminated by, the collective agreement. In concluding that removal was improper, the Court specifically refrained from expressing any opinion on the merits of the preemption defense, holding that such a decision was up to the state court in the first instance. 107 S. Ct. at 2433 n.13. As a result, the Court did not address the issue of the preemptive effect of a collective bargaining agreement, the provisions of which directly conflict with individual contracts.

In the instant case, the Pennsylvania Supreme Court addressed the issue reserved for decision in *Caterpillar*, and found no preemption, despite the conflict between the individual and collective agreements, and despite the decision of the Adjustment Board rejecting the employees' claims. Unlike *Caterpillar*, Amtrak has not argued that the employees' claims in *Cummings* are essentially federal, but rather that the claims are inconsistent with the collective bargaining agreement, are subject to the Board of Adjustment's jurisdiction as incidental to employment, and were determined to be preempted by the Board. Accordingly, the decision of the Pennsylvania Supreme Court, which decides the issue left unresolved by *Caterpillar*, should be reviewed, in order to clarify the applicability of *J.I. Case* in the RLA context, in light of *Caterpillar*.[8]

Moreover, the decisions of three federal courts of appeal, two of which arose under the RLA, conflict with the reasoning adopted by the Pennsylvania Supreme Court. In *McKinney v. International Association of Machinists*, 624 F.2d 745, the Sixth Circuit held that state law claims by railroad employees covered by a collective bargaining agreement who were passed over for promotion were preempted by the RLA, despite their allegations that the carrier promised such promotions to them at the time of their entrance into an apprenticeship program. In *Lewellyn v. Fleming*, 154 F.2d 211 (10th Cir.), *cert. denied*, 329 U.S. 715 (1946), the Tenth Circuit

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8. The facts in *Caterpillar* can be distinguished from the instant case with regard to the application of *J.I. Case*. The promises made to the employees in *Caterpillar* were capable of being satisfied without any conflict with the collective bargaining agreement, because the employees could have been maintained in managerial positions. In *Cummings*, the promotions were in direct conflict with the procedure established by the collective agreement. Accordingly, while the Court recognized that individual agreements could coexist with collective agreements in *Caterpillar*, 107 S. Ct. at 2432 n.10, *J.I. Case* still stands for the proposition that a clear conflict between individual and collective agreements must be reconciled by reliance upon the collective agreement. Because this issue was not addressed in *Caterpillar*, Certiorari is appropriate here, to resolve this important federal question.

interpreted this Court's decision in *Railroad Telegraphers* to require that individual employment agreements entered into at the time of hire must yield to a collective agreement. Finally, the Fifth Circuit in *Eitmann v. New Orleans Public Service*, 730 F.2d 359, held that this Court's decision in *J.I. Case* prohibited the enforcement of an individual agreement under which employment would be maintained despite the employee's disability, where a collective bargaining agreement governed the terms and conditions of his employment. Unlike the Pennsylvania Supreme Court in the instant case, the Fifth Circuit in *Eitmann* held that *Belknap* did not affect this result, reasoning that *Belknap* did not involve a claim by employees covered by a collective agreement who could seek relief pursuant to that agreement.[9]

Although a careful reading of this Court's decisions would appear to require collective agreements to supersede individual agreements, there is some confusion among the courts of appeal concerning the enforceability of individual contracts in an organized environment. In contrast to the decisions described above by the Fifth, Sixth and Tenth Circuits, the Eighth Circuit in *Anderson v. Ford Motor Co.*, 803 F.2d 953 (8th Cir. 1986) and the Eleventh Circuit in *Varnum v. Nu-Car*, 804 F.2d 638 (11th Cir. 1986) have both upheld state law claims based on individual promises relating to the terms and conditions of employment made upon the commencement of employment, despite coverage by a collective bargaining agreement subject to the NLRA.[10] In addition, the Supreme

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9. The Court in *Belknap* did note that *J.I. Case* did not preclude the enforcement of individual contracts for damages, as opposed to equitable relief, because the NLRB had no jurisdiction to consider the issue. 463 U.S. at 506. Although a damage action was permitted to go forward under the facts of *Belknap*, however, the reasoning of *Eitmann* and the discussion at pp 11-12, *infra*, demonstrate that a damage action would have just as deleterious an effect an national labor policy as a suit for injunctive relief, under the instant circumstances.

10. In addition to the above, two panels of the Ninth Circuit arrived at opposite conclusions on this issue. *Compare Williams v. Caterpillar Tractor Co.*, 786 F.2d 928 (9th Cir. 1986), *aff'd*, ___ U.S. ___, 107 S. Ct. 2425 (1987)

Court of Alaska has upheld promises made to a strike replacements under facts analogous to *Belknap*, in the RLA context. *Bubbel v. Wien Air Alaska, Inc*, 682 P.2d 374 (Alaska 1984).

Based on the above, it is apparent that there is a substantial conflict among the Circuits and between the Circuits and the state courts as to whether individual agreements in conflict with a collective agreement may be enforced. This significant issue of public importance was left open by the Court in *Caterpillar*. Accordingly, this Court should grant review of the decision of the court below.

(individual agreements enforceable) *with Bale v. General Telephone Co.*, 795 F.2d 775 (individual agreements not enforceable). To the extent that the decisions of the Ninth Circuit in *Caterpillar* and *Bale*, the Fifth Circuit in *Eitmann* and the Sixth Circuit in *McKinney* dealt with the issue of the removal of state law claims, this Court's decision in *Caterpillar* has resolved that dispute. As noted above, however, *Caterpillar* did not resolve the underlying preemption issue, over which the various courts of appeal disagree. Moreover, the decisions by the Eight Circuit in *Anderson*, the Eleventh Circuit in *Varnum* and the Tenth Circuit in *Lewellyn* are not affected by *Caterpillar*, for jurisdiction in those cases was premised on diversity of citizenship.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a Writ of Certiorari issue to review the judgment of the Supreme Court of Pennsylvania in this case.

Respectfully submitted,

HARRY A. RISSETTO*
1800 M. Street, N.W.
Washington, D.C. 20036

ALLEN J. GROSS
KENNETH D. KLEINMAN
2000 One Logan Square
Philadelphia, PA 19103

HENRY H. PERRITT, JR.
Villanova Law School
Villanova, PA 19085

HAROLD HENDERSON
400 North Capitol Street, N.W.
Washington, D.C. 20001

Of Counsel:

MORGAN, LEWIS & BOCKIUS

*Counsel of Record

APPENDIX

Lieut. Thomas CUMMINGS, Lieut. John Gallagher, Lieut. Ronald Stachowski, Lieut. William Boland, Lieut. Stephen McGovern, Lieut. John Ryan, Lieut. Kurt Kemmessies, Lieut. Michael Amico, Sgt. Neville Booth, Lieut. Michael Serfess, Lieut. Lawrence Clark, Lieut. John Riggin, Lieut. Harold Plude, Lieut. Robert Slimbock, Lieut. Harry Halbe, Lieut. John Griffin, Sgt. Vaughn Carver, Sgt. Charles Yager, Sgt. Gerald Adams, Sgt. Stephen Warner, Sgt. Carl Gustafson, Sgt. Richard Yost, Sgt. Robert Crowley, Sgt. Frank Rapinesi, and Sgt. Robert Coulson, *Appellants*,

v.

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK), *Appellee*.

Supreme Court of Pennsylvania.

Argued Dec. 1, 1986.
Decided March 30, 1987.

Railroad security personnel brought action against railroad for breach of employment contract and misrepresentation, alleging that they quit other jobs as security or police officers in reliance on promise by railroad of full-time supervisory positions in its police force and that railroad breached that promise by later demoting them. After returning verdict in favor of security personnel, the Court of Common Pleas, Delaware County, No. 78-12717, determined that it lacked subject matter jurisdiction, and entered judgment notwithstanding verdict. On appeal, the Superior Court, No. 3634, Philadelphia, 1982, 343 Pa.Super. 137, 494 A.2d 393, affirmed, and security personnel appealed. The Supreme Court, Hutchinson, J., held that claims for misrepresentation and breach of employment contract were not preempted by Railway Labor Act.

Reversed and initial judgment reinstated.

States—18.45

Misrepresentation and breach of employment contract claims of railroad security personnel, who alleged they quit

other jobs as security or police officers in reliance on railroad's promise of full-time supervisory positions in its police force and that railroad breached that promise by later demoting them, were not preempted by the Railroad Labor Act; individual claims were separate and distinct from those governed by RLA. Railway Labor Act, §§ 1-208, as amended, 45 U.S.C.A. §§ 151-188.

Alexander A. DiSanti, John M. Gallagher, Jr., Media, for appellants.

Allen J. Gross, Michael J. Ossip, Philadelphia, for appellee.

Before NIX, C.J., and LARSEN, FLAHERTY, McDERMOTT, HUTCHINSON, ZAPPALA and PAPADAKOS, JJ.

OPINION OF THE COURT

HUTCHINSON, Justice:

Appellants appeal by allowance a Superior Court order which affirmed a judgment n.o.v. entered by Delaware County Common Pleas. Appellants sued claiming that appellee, AMTRAK, promised them full time supervisory positions in its police force and breached that promise by later demoting them. In reliance, they quit other jobs as security or police officers. The court returned a verdict in appellants' favor. However, Common Pleas subsequently held that it lacked subject matter jurisdiction because appellants' claims are governed by the Railway Labor Act (RLA), 45 U.S.C. §§ 151-88. Thus, they are subject to the exclusive jurisdiction of the National Railroad Adjustment Board (Board). Accordingly, it granted AMTRAK's motion for judgment n.o.v., 343 Pa.Super. 137, 494 A.2d 393.

We hold that appellants' individual claims are separate and distinct from those governed by the RLA and, therefore, are not within the Board's jurisdiction over claims arising under railway labor agreements. Appellants' claims for breach of individual employment contracts and misrepresentation

are cognizable under our state law. The judgment n.o.v. Common Pleas entered was improper and must be reversed.

AMTRAK was created by an act of Congress in 1970. In 1976, it exercised a statutory option[1] and purchased properties from the trustees of the bankrupt Penn Central Railroad. It took responsibility for operating and maintaining these properties; security was one of these responsibilities. AMTRAK had to establish an operating railroad police force in short order. To do so it recruited experienced police and security professionals from government and industry to fill supervisory positions as lieutenants and sergeants.[2] Appellants, twenty-five individuals experienced in the security and law enforcement fields, were recruited for this purpose. They had been employed in responsible positions in government and industry. In many, if not all, cases, they had substantial seniority in their prior jobs and good chances of advancement. They claim AMTRAK told them that the positions were permanent and advancement was possible. They testified that they quit their jobs and accepted positions with AMTRAK in reliance upon these representations.

AMTRAK also needed patrolmen to staff its police force. To this end, it negotiated an agreement with ConRail and the International Brotherhood of Teamsters (Teamsters), the union which had represented ConRail's patrolmen. Under it, the patrolmen were transferred from ConRail to AMTRAK, subject to the pre-existing collective bargaining agreement between ConRail and the Teamsters. Those patrolmen who "conveyed over" also brought their accumulated ConRail seniority with them.[3] The collective bargaining agreement contained a procedure for promotion of patrolmen to sergeant and lieutenant. Under it these officers are drawn from the

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1. The option was contained in the Regional Rail Reorganization Act, *as amended*, 45 U.S.C. §§ 701-797m (Supp.1986), which created ConRail out of several bankrupt northeastern railroads.

2. Appellants were hired at the ranks indicated in the caption.

3. This was guaranteed by section 504(f) of the Regional Rail Reorganization Act, *as amended*, 45 U.S.C. § 774(f)(1)(D) (repealed 1981).

patrolmen ranks. A test is administered; individuals who pass the test are promoted in order of seniority. Appellants claim that either they were left ignorant of this agreement or were told that special arrangements had been made with the Teamsters which allowed AMTRAK to hire them permanently as officers.

A few months after they were hired, appellants were told that their future employment position would be determined under the collective bargaining agreement's promotion procedure. Learning that any patrolman who passed the test would have greater seniority than they would and would be eligible for promotion before them, they refused to take the test.

Appellants then challenged the Teamsters status as collective bargaining representative for the AMTRAK police. They also brought suit in United States District Court for the Eastern District of Pennsylvania to prevent AMTRAK from administering the promotion test. An injunction was granted in December, 1976. *Slimbock v. National Rail Passenger Corp.*, No. 76-3840 (E.D.Pa. December 15, 1976). It enjoined AMTRAK from administering the test pending the outcome of the representation dispute. Ultimately the Teamsters were decertified as the collective bargaining representative and a representation election was held. In it, the Patrolman's Benevolent Association, Long Island Railroad (PBA) defeated the Teamsters and the AMTRAK Police Association, appellants' choice. The PBA was certified as the collective bargaining representative for the AMTRAK police and the injunction dissolved. *Id.* (April 27, 1978).

Thereafter the promotion test was given; appellants still refusing to take it. They were then notified that they would be demoted on May 18, 1978. They again filed suit in federal district court seeking to enjoin AMTRAK from demoting them. That court dismissed the complaint on the ground that it lacked subject matter jurisdiction because that dispute was within the exclusive jurisdiction of the National Railroad Adjustment Board. *Slimbock v. National Rail Passenger Corp.*, No. 78-1662 (E.D.Pa. May 18, 1978). Consistent with AMTRAK's plans, appellants were demoted. They then filed

grievances under the collective bargaining agreement challenging the demotions. The grievances were denied at the first level, and PBA refused to carry them further.

Appellants took the matter to the next grievance level on their own. They filed statements of claim with the Board, an administrative tribunal established by the RLA. 45 U.S.C. § 153. The United States Supreme Court has held that the Board has sole jurisdiction to finally decide "minor disputes."[4] *Andrews v. Louisville & N.R.R.*, 406 U.S. 320, 92 S.Ct. 1562, 32 L.Ed.2d 95 (1972). The Board denied appellants' claims. It held that AMTRAK properly applied the provisions of the collective bargaining agreement on promotions to appellants and properly demoted them under those provisions.

However, appellants had also filed suit in Delaware County Common Pleas. There they claimed that in detrimental reliance on AMTRAK's promise of permanent supervisory employment they had left responsible positions in government and industry, and that AMTRAK breached that promise when it demoted them to lower paying, less prestigious positions.[5] Accordingly, they sought damages for loss of wages, benefits and prestige. In a bench trial, the court returned a verdict in appellants' favor totaling $890,000. AMTRAK moved for a judgment n.o.v. on the ground that Common Pleas lacked subject matter jurisdiction.[6] Common Pleas

4. "Minor disputes" concern the application or interpretation of an existing collective bargaining agreement. "Major disputes," on the other hand, arise in the making of a collective bargaining agreement. *Elgin, Joliet & Eastman Ry. v. Burley*, 325 U.S. 711, 65 S.Ct. 1282, 89 L.Ed. 1886 (1945). The matter before the Board was a "minor dispute."

5. We note in passing that appellants' claims are not quasi-contract claims under the principles set forth in the Restatement of Restitution §§ 1, 3 (1937). *See also* Restatement of Restitution § 90 (discussing reliance in a tort context). They are based on actual contracts. Their promises to leave their jobs and work for AMTRAK provide adequate consideration.

6. Appellants allege that AMTRAK waived this argument by failing to raise it before the verdict was returned. Challenges to jurisdiction over the subject matter are not subject to waiver. *Vale Chemical Co. v. Hartford Accident and Indemnity Co.*, ___ Pa. ___, 516 A.2d 684 (1986); *In re Patterson's Estate*, 341 Pa. 177, 19 A.2d 165 (1941); Pa.R.C.P. 1032. Therefore, we must address AMTRAK's argument.

agreed and granted judgment n.o.v. It held that appellants were simply protesting the way the promotion provisions of the collective bargaining agreement were applied to them, an aspect of a "minor dispute" under the RLA within the sole jurisdiction of the Board. Thus, both state and federal courts are precluded from hearing these claims already considered and denied by the Board.

Superior Court affirmed, basically adopting Common Pleas rationale.[7]

The RLA is a federal statute. When interpreting a federal law, of course, we are bound by the holdings of the United States Supreme Court on the issue before us. Additionally, we may look to that Court for guidance when it has not addressed the precise federal issue before us but has spoken in a related federal context. The United States Supreme Court has considered an issue seemingly analogous to the one before us. In a recent decision, *Belknap, Inc. v. Hale*, 463 U.S. 491, 103 S.Ct. 3172, 77 L.Ed.2d 798 (1983), it held that individual state contract claims are not necessarily preempted by the National Labor Relation Act (NLRA), 29 U.S.C. §§ 151-68.

Though *Belknap* arose under the NLRA instead of the RLA, we believe its holding is properly analogous to the case before us. Indeed, the United States Supreme Court has held that courts should look to cases decided under the NLRA when confronted with similar issues arising under the RLA. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 89 S.Ct. 1109, 22 L.Ed.2d 344 (1969).

Both the NLRA and the RLA are part of an existing body of federal statutory labor law.[8] The basic policy and purpose of

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7. If the issues before the Board under the collective bargaining agreement and before our state courts under AMTRAK's promises to appellants involve the same contract, appellants would also face the problem of issue preclusion. For the reasons set forth *infra*, we believe that AMTRAK's agreements with appellants are individual contracts separate and distinct from the collective bargaining agreement. Therefore, the issue of whether federal preemption deprives state courts of subject matter jurisdiction must be faced directly.

8. Federal railroad legislation dates back to the 1890's. Following the

both is the same: to foster industrial peace and prevent strikes and disruptions in the flow of interstate commerce by guaranteeing workers' right to organize and promoting collective bargaining. 45 U.S.C. § 151a; 29 U.S.C. § 151. *See, e.g., Virginian Ry. v. System Federation No. 40*, 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789 (1937) (dealing with RLA); *N.L.R.B. v. American National Insurance Co.*, 343 U.S. 395, 72 S.Ct. 824, 96 L.Ed. 1027 (1952) (dealing with the NLRA). *Generally, see also Comment, The National Labor Relations Act at Fifty: Roots Revisited, Heart Rediscovered*, 23 Duq.L.Rev. 1059 (1985). The two acts, however, do differ in implementation and mechanics. The NLRA envisions a contest of economic strength between the union and company after bargaining reaches impasse. Strikes and lockouts are weapons in this clash. *N.L.R.B. v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 87 S.Ct. 2001, 18 L.Ed.2d 1123 (1967). In Congress' judgment, however, rail transportation is too vital to interstate commerce to permit quick resort to economic war. *Virginian Ry., supra* 300 U.S. at 552-56, 57 S.Ct. at 601-03. Under the RLA, the parties must first comply with a number of statutory provisions designed to foster voluntary settlement of "major disputes" before a strike may occur. *Brotherhood of Railroad Trainmen, supra; Virginian Ry., supra. See* 45 U.S.C. §§ 154-60. The Board has the power to finally decide all "minor disputes." 45 U.S.C. § 153; *Elgin, Joliet & Eastman Ry., supra*. Thus, the parties cannot resort to strike or other self help. These are differences in degree, manner of implementation and mechanics; they are not material to the matter before us. The basic purposes and policy of the two statutes are the same.

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disastrous Pullman Strike, a presidential commission studied the strike and made recommendations to prevent future railroad strikes. The commission proposed the enactment of federal legislation guaranteeing the right of railroad workers to freely organize and bargain collectively and establishing means to mediate labor disputes. The Erdman Act, passed in 1898, followed. Additional laws were passed in ensuing years, including the present statute, the RLA, in 1926. The NLRA, which covers workers in most other industries, was not enacted by Congress until 1935. I *The Developing Labor Law* 13-21 (C. Morris 2d ed. 1983).

In *Belknap*, negotiations between an employer and a union reached impasse; the union called a strike. The Company hired replacements and promised them permanent positions. The replacements and union workers who stayed on the job were given a raise. Subsequently, the Union filed an unfair labor practice charge with the National Labor Relations Board (N.L.R.B.) alleging that the unilateral wage increase violated §§ 8(a)(1), (3) and (5) of the NLRA. The Company assured the replacements that their positions were secure. Eventually, the Union and Company settled the strike. As part of the settlement, the Union agreed to drop the unfair labor practice charge in return for reinstatement of all strikers. The Company, in turn, laid-off all of the replacements. The replacements sued the Company in Kentucky state court alleging misrepresentation and breach of contract. The trial court granted the Company's motion for summary judgment on the ground that Congress had preempted the field by enacting the NLRA. The Kentucky Court of Appeals reversed. It held that the claim was not preempted because it was only peripheral to the NLRA and was deeply rooted in local law. The United States Supreme Court granted certiorari.[9]

Under the doctrine set forth in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959), state law covering conduct arguably covered by the NLRA is presumably preempted. *Id.* at 243-44, 79 S.Ct. at 778-79. However, if the state law is concerned with matters peripheral to federal law or deeply rooted in state law, there is no federal preemption. *Id.* In *Belknap*, the Company argued that the replacements' state law claims were subject to the presumption, neither exception applied, and so were preempted.

The United States Supreme Court examined this pre-

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9. The Kentucky Supreme Court agreed to hear the case but later dismissed it as improvidently granted.

emption argument under *San Diego Building Trades, supra.*[10] The Court rejected this argument. Instead, it found both the exception for matters peripheral to federal law and the exception for matters deeply rooted in state law applicable. The Court stated that federal law is concerned with the rights of strikers and found that the state claims directly and primarily concern the replacements' rights. Accordingly, it held the replacements' rights peripheral to federal law. The Court also found a strong state interest in protecting citizens from misrepresentation and breaches of contract which brought the case within the other preemption exception. Relying on other cases in which it had allowed state claims in labor-related contexts, the United States Supreme Court held that the replacements' state law claims for breach of contract and misrepresentation were not preempted under this doctrine. *Linn v. United Plant Guard Workers*, 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966) (state law action for injuring reputation is not preempted by the NLRA even if the comments constitute an unfair labor practice); *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977) (state law action for intentional infliction

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10. The Supreme Court in *Belknap* also addressed another federal labor law preemption doctrine; that doctrine was set forth in *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976). Under it, state law dealing with a party's conduct during a labor dispute is preempted where Congress intentionally left that area unregulated. The Court held Congress intended labor disputes arising under the NLRA to be controlled by "the free play of economic forces," *id.* at 140, 96 S.Ct. at 2553, and left them unregulated. The Company in *Belknap* argued that the replacements' claims were preempted under this doctrine as well. The Court considered and rejected the Company's arguments for preemption based on Congress' intent to leave the conduct of strikes unregulated. We need not discuss this aspect of preemption further. It is not applicable or relevant to the case before us. In addition, the NLRA and RLA are materially different in this context. Congress did not intend railroad labor disputes to be resolved solely by the "free play of economic forces," but has provided statutory mechanisms for dispute resolution without a work stoppage. *See* pp. 341-342.

of emotional distress not preempted by the NLRA even if the conduct also constitutes an unfair labor practice); *Sears Roebuck, Inc. v. Council of Carpenters*, 436 U.S. 180, 98 S.Ct. 1745, 56 L.Ed.2d 209 (1978) (state trespass action for picketing not preempted by the NLRA).

The instant case is analogous to *Belknap*. In each, workers were offered and accepted permanent positions. Pursuant to a valid collective bargaining agreement, they were subsequently removed from those jobs. The removals were proper under the collective bargaining agreement. The workers, who relied on the employer's promise, sued in state court and claimed that their rights under state law were violated. The claims were for breach of contract and misrepresentation. In *Belknap*, the N.L.R.B. under the NLRA was interested in protecting striking workers from unfair labor practices; it was not concerned with the replacements' rights. Similarly here, the interest of the Board under the RLA here is the protection of the workers' rights under the collective bargaining agreement. It has no interest in appellants' state law rights because they arose separately from the collective bargaining agreement. Pennsylvania has an interest as strong as Kentucky or any other state in protecting its citizens from breaches of contract and misrepresentations. Thus, both exceptions to the presumption of federal preemption for unregulated conduct (peripheral to federal law and deeply rooted in state law, *San Diego Building Trades, supra*) are applicable here.

Given the factual similarity and the virtually identical purpose of the two federal acts, *see* pp. 341-342, we see no reason to reach a different result here than the United States Supreme Court did in *Belknap, supra*. Therefore, we hold that appellants' state law claims were not preempted by the RLA. Common Pleas did not lack subject matter jurisdiction and improperly granted appellee AMTRAK's motion for judgment n.o.v.

Aside from *Belknap*, the established test for federal preemption is whether both state and federal laws can operate "without impairing the federal superintendence of the field. . . ." *Florida Lime Growers v. Paul*, 373 U.S. 132, 142, 83

S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963).[11] The federal interests here are the prevention of strikes and maintenance of the flow of interstate commerce by promoting meaningful collective bargaining and protecting employees' rights under collective bargaining agreements. Appellants' claims, however, do no damage to the integrity of the collective bargaining agreement nor are they likely to cause additional labor strife. They have accepted the judgment of the Board that they were properly demoted under the terms of the collective bargaining agreement. They seek only monetary damages, not return of their jobs, and have not threatened any concerted action which would disrupt railroad service or disturb the job security of the railroad workers the Teamsters had under the contract with Conrail and the PBA now has with AMTRAK. Their claim is based on individual contracts in which AMTRAK promised them jobs; relying on this promise, they quit other jobs. These contracts are separate from the collective bargaining agreement and do not affect it.[12] In spite of AMTRAK's breach of appellants' individual contracts, the collective bargaining agreement still defines the employment

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11. This is essentially identical to the doctrine set forth in *San Diego Building Trades, supra.*

12. The United States Supreme Court has held that individual employment contracts dealing with matters covered in collective bargaining agreements are invalid under the RLA apparently because they interfere with the collective relationship between the workers and their bargaining representative. *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 346-47, 64 S.Ct. 582, 585, 88 L.Ed. 788 (1944). Collective bargaining agreements govern the employment relationship and deal with such matters as compensation, rules and working conditions for employees. *Id.* They do not deal with recruitment except to the extent that certain trade union agreements use hiring halls. *See Local 357, International Brotherhood of Teamsters v. N.L.R.B.*, 365 U.S. 667, 81 S.Ct. 835, 6 L.Ed.2d 11 (1961). The individual contracts at issue here dealt with AMTRAK's promise to hire appellants and are thus outside of the collective bargaining agreements' scope. Accordingly, these contracts are not forbidden under *Order of Railroad Telegraphers, supra. See also J.I. Case v. N.L.R.B.*, 321 U.S. 332, 64 S.Ct. 576, 88 L.Ed. 762 (1944) (cited in *Order of Railroad Telegraphers* for general discussion of the relation of individual contracts and collective bargaining agreements).

relationship. In fact, we see no way that this claim would "impair federal superintendence."

Neither we nor the United States Supreme Court have held that the RLA has wholly preempted the railway labor field. *Terminal Railroad Association of St. Louis v. Brotherhood of Trainmen*, 318 U.S. 1, 63 S.Ct. 420, 87 L.Ed. 571 (1943) (states may regulate matters dealing with the health, safety and welfare of workers); *Baltimore & O. R.R. v. Commonwealth, Department of Labor and Industry*, 461 Pa. 68, 334 A.2d 636, *appeal dismissed*, 423 U.S. 806, 96 S.Ct. 14, 46 L.Ed.2d 26 (1975) (state may specify pay periods for railroad workers).

This is not a situation like *California v. Taylor*, 353 U.S. 553, 77 S.Ct. 1037, 1 L.Ed.2d 1034 (1957), in which a state law denied workers on a state owned railroad the right to bargain collectively. The state law there clearly interfered with the RLA, and the United States Supreme Court struck it down. Nor is this case like *Union Pacific R.R. v. Price*, 360 U.S. 601, 79 S.Ct. 1351, 3 L.Ed.2d 1460 (1959). In that case a railroad worker brought a common law diversity action alleging wrongful discharge based on the terms of the collective bargaining agreement. His claim under the agreement had been adjudicated and denied by the Board. He tried to relitigate his dismissal, still relying on the collective bargaining agreement in United States District Court. The United States Supreme Court held that he was bound by the Board's decision and could not relitigate it. Unlike *Price*, appellants' claim is not based on the collective bargaining agreement but on their prior contract with AMTRAK. The Board did not and could not address that matter.

For the foregoing reasons, the order of Superior Court affirming Delaware County Common Pleas is reversed and the initial judgment rendered in favor of appellants is reinstated.

Lieut. Thomas CUMMINGS; Lieut. John Gallagher; Lieut. Ronald Stachowski; Lieut. William Boland; Lieut. Stephen McGovern; Lieut. John Ryan; Lieut. Kurt Kemmessies; Lieut. Michael Amico; Sgt. Neville Booth; Lieut. Michael Serfess; Lieut. Lawrence Clark; Lieut. John Riggin; Lieut. Harold Plude; Lieut. Robert Slimbock; Lieut. Harry Halbe; Lieut. John Griffin; Sgt. Vaughn Carver; Sgt. Charles Yager; Sgt. Gerald Adams; Sgt. Stephen Warner; Sgt. Carl Gustafson; Sgt. Richard Yost; Sgt. Robert Crowley; Sgt. Frank Rapinesi; Sgt. Robert Coulson, *Appellants,*

v.

NATIONAL RAILROAD PASSENGER CORPORATION, (AMTRAK), *Appellee.*

Superior Court of Pennsylvania.
Argued Sept. 6, 1984.
Filed April 19, 1985.
Reargument Denied June 28, 1985.

Railroad employees brought action against railroad, alleging breach of their respective contracts of employment. After nonjury trial resulted in verdict for employees, the Court of Common Pleas, Delaware County, No. 78-12717, Civil Division, Labrum, J., determined that it lacked subject matter jurisdiction, and entered judgment n.o.v. Employees appealed. The Superior Court, No. 3634 Philadelphia, 1982, Montgomery, J., held that employment contract claims of employees recruited for railroad police force could not be evaluated without reference to their rights under applicable collective bargaining agreement, with disputes thereunder to be resolved by the National Railroad Adjustment Board; thus Court of Common Pleas properly determined that it lacked subject matter jurisdiction to entertain the employees' purportedly independent contract claims, particularly after the Board had ruled adversely to the employees on essentially the same claims, on basis of collective bargaining agreement provisions.

Affirmed.

Labor Relations 416.5

Employment contract claims of employees recruited for railroad police force could not be evaluated without reference to their rights under applicable collective bargaining agreement, with disputes thereunder to be resolved by the National Railroad Adjustment Board; thus, Pennsylvania Court of Common Pleas properly determined that it lacked subject matter jurisdiction to entertain the employees' purportedly independent contract claims, particularly after the Board had ruled adversely to the employees on essentially the same claims, on basis of collective bargaining agreement provisions. Railway Labor Act. § 1 et seq., 45 U.S.C.A. § 151 et seq.

Alexander A. DiSanti, Media, for appellants.
Allen J. Gross, Philadelphia, for appellee.
Before CIRILLO, OLSZEWSKI and MONTGOMERY, JJ.

MONTGOMERY, Judge:

The instant appeal arises from an order by the lower court denying the Plaintiff-Appellants' petition for reconsideration and affirming a previous order which sustained the Defendant-Appellee's exceptions and entered a judgment n.o.v. in its favor. The Appellants instituted this action asserting that the Appellee had breached their respective contracts of employment. After a non-jury trial resulted in a verdict for the Appellants, the lower court determined that it lacked subject-matter jurisdiction, and entered a judgment n.o.v. The Appellants contend that their action was properly before the court and seek an order for judgment on the original verdict.

The Appellee is the National Railroad Passenger Corporation, popularly known as AMTRAK. It recruited the Appellants as supervisors, lieutenants, and sergeants for its police force. The Appellants assert that when hired, they were offered permanent employment in their positions. AMTRAK maintains they were offered only temporary employment. The

trial court found that the evidence supported the position of the Appellants on the issue of whether AMTRAK extended a promise of permanent jobs.

While that was the central issue to be resolved in proceedings in the lower court, the critical jurisdiction question presented on appeal requires an understanding of the pertinent factual and procedural background of the dispute. AMTRAK was a party to a collective bargaining agreement with the International Brotherhood of Teamsters [hereinafter IBT]. The agreement included a clause covering promotions to sergeants and lieutenants. Openings for such jobs were to be filled on the basis of seniority, by applicants from the IBT bargaining unit, who passed a promotional examination. Shortly after the Appellants began their employment, they were informed that their positions were subject to the promotional scheme of the aforementioned collective bargaining agreement. A sufficient number of patrolmen from the IBT bargaining unit, who were all hired before the Appellants, and who enjoyed higher seniority, passed the examination to fill all of the supervisory positions. The Appellants refused to take the examination, assertedly because they felt that they were being treated unfairly. AMTRAK then determined that the Appellants were unable to retain their positions and notified them that they would be demoted.

The Appellants sought relief through various proceedings. They instituted an action in the United States District Court for the Eastern District of Pennsylvania to enjoin AMTRAK from giving the examination until the Appellants could challenge the IBT's status as bargaining representative. The National Mediation Board, the Federal administrative agency having jurisdiction over such disputes in the railroad industry, ordered an election. The AMTRAK police chose the Patrolmen's Benevolent Association [hereinafter PBA] as their representative, and the Federal District Court thereafter dissolved an injunction it had issued. Although the IBT was no longer the bargaining representative, the Appellants were nevertheless demoted.

The Appellants filed union contract grievances.

AMTRAK denied their grievances and the PBA refused to appeal that denial any further in the contractual grievance procedure. After their grievances were denied, the Appellants filed Statements of Claim with the National Railroad Adjustment Board [hereinafter NRAB], another Federal administrative agency which handles railroad industry disputes. The Appellants' claims were denied; the NRAB ruled that AMTRAK acted properly in adhering to the promotional clause in the applicable collective bargaining agreement.

The Appellants, contemporaneously with the filing of union grievances, instituted the instant action against the Appellee in the Court of Common Please of Delaware County. On October 1, 1981, the trial court awarded the Appellants over $890,000.00 for lost wages and other damages. The Appellee filed exceptions on October 19, 1981, in which it challenged, for the first time, the lower court's subject matter jurisdiction.[1] As previously noted, the lower found merit in the Appellee's jurisdiction arguments.

The lower court grounded its decision upon the conclusion that the claims of the Appellants were subject to the exclusive jurisdiction of the NRAB. The Appellants, while recognizing the broad authority of the NRAB in resolving disputes between employers and employees and their labor organizations in the railway industry, nevertheless claim that the purportedly independent employment contract claims they raise are properly subject to resolution in our state courts. After thorough consideration, we are convinced that the Appellee's jurisdiction argument was meritorious. Therefore, we conclude that the lower court acted properly in granting judgment n.o.v., and we affirm the order of the trial court.

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1. Counsel for both parties had stipulated to an extension of the time for filing exceptions pursuant to Pa.R.C.P. 248. On September 20, 1982, the court sustained the exceptions and entered a judgment n.o.v. in favor of AMTRAK. The Appellants filed a notice of appeal with this Court on October 15, 1982, and then petitioned the lower court for reconsideration. On October 20, 1982, the trial court granted reconsideration. Thereafter, the appeal to this court was stricken. On December 10, 1982, the trial court dismissed the application for reconsideration. The instant appeal was filed on December 21, 1982.

The United States Congress enacted the Railway Labor Act (45 U.S.C. § 151, et seq.) in order to properly regulate and provide for the important national commerce concerns regarding the transportation industry. In recognition of peculiar concerns about labor relations stability in this area, the Congress mandated the arbitration of such labor disputes as might arise, and, by 1934 legislation, created the NRAB as the forum for such arbitration. See *Union Pacific Railway Co. v. Price*, 360 U.S. 601, 79 S.Ct. 1351, 3 L.Ed.2d 1460 (1959) for an excellent explanation of the historical background of this railway legislation. Specifically, the NRAB was to resolve disputes in the railway industry arising out of the interpretation or application of collective bargaining agreements. 45 U.S.C.A. § 153. Such disagreements, known as "minor disputes", relate

> [E]ither to the meaning or proper application of a particular [collective bargaining agreement] provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective bargaining agreement. . . .

Elgin J. & E. Railway Co. v. Burley, 325 U.S. 711, 723, 65 S.Ct. 1282, 1290, 89 L.Ed. 1886, 1894 (1945). It is clear that in establishing the NRAB, the Congress intended that such disputes would be resolved by an agency with special expertise in the railroad industry. *Hudie v. Alquippa & S.R. Co.*, 249 F.Supp. 210 (W.D.Pa.1966).[2] It has also been held that the intent of the legislation was to leave minimum responsibility to the courts. *Taylor v. Hudson Rapid Tubes Corp.*, 362 F.2d 748 (3rd Cir. 1966).

The Appellants strenuously argue that their claims do not constitute a "minor dispute". They maintain that their action is not related to a collective bargaining contract dispute, but is based upon an entirely separate breach of contract claim.

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2. Affirmed, 360 F.2d 213 (3rd Cir.1966).

They assert that the Appellee violated the terms of the individual contractual offers of employment it made, upon which each Appellant purportedly relied in accepting his respective job with the Appellee.

We cannot agree that the instant dispute is unrelated to the collective bargaining agreement which covers these employees, and further, cannot conclude that the claims raised by the Appellants in this action, while clothed in the rubric of a state common-law cause of action, are properly excluded from the broad genus of railway industry cases assigned by the Congress to exclusive resolution by the NRAB. Simply stated, to allow the Appellants to proceed in our state courts in this case would exalt form, in the nomenclature used in the Appellants' pleading, over substance, in terms of the realities of the case.

The Appellants have previously challenged the propriety of the actions of their employer, before the NRAB, and sought to be reinstated to the positions in which they were originally hired, but which eventually were vacated and then awarded to other employees who had more seniority than the Appellants. Such action was taken by the Appellee because of the provisions of the applicable labor agreement covering the jobs. In the NRAB case, the Appellants based their claims upon the same individual contract rights which they rely upon for support in claiming damages in the instant action. The NRAB held that such individual rights conflicted with the collective bargaining contract rights of the union membership at large, and declared that the provisions of the collective bargaining agreement must prevail over any individual employment agreements. The Appellants' requests for relief were denied.

All of the Appellants' claims in this case are inextricably entwined with their rights under their collective bargaining agreement. In essence, they disagree with the manner in which that contract was applied to them, in view of the individual circumstances of their respective hirings. Because their rights under the collective bargaining agreement vis-a-vis their alleged individual employment agreements has already been ruled upon by the NRAB, our state courts have no

jurisdiction to pass upon the same contentions. It is clearly not the right of the courts in our Commonwealth to review the fairness or propriety of NRAB decisions, nor to address "minor disputes", a function which Federal legislation places within the exclusive jurisdiction of the NRAB.

Our conclusions in this case are guided by clear precedent from the United States Supreme Court and other Federal courts in analogous cases. In *Union Pacific Railroad Company v. Price, supra*, the Court was presented with a situation in which a discharged employee, who had unsuccessfully contested his dismissal before the NRAB, thereafter sought damages from his employer in a commonlaw wrongful discharge case instituted in the District Court.[3] Writing for the Majority, Justice Brennan thoroughly explained the legislative history leading to the 1934 birth of the NRAB, and then stated:

> Plainly the statutory scheme as revised by the 1934 amendments was designed for effective and final decision of grievances which arise daily, principally as matters of the administration and application of the provisions of collective bargaining agreements. This grist of labor relations is such that the statutory scheme cannot realistically be squared with the contention that Congress did not purpose to foreclose litigation in the courts over grievances submitted to and disposed of by the Board . . . To say that the discharged employee may litigate the validity of his discharge in a common-law action for damages after failing to sustain his grievance before the Board is to say that Congress planned that the Board should function only to render advisory opinions, and intended the Act's entire scheme for the settlement of grievances to be regarded "as wholly conciliatory in character, involving no element of legal effectiveness, with the consequence that the parties are entirely free to accept or ignore the Board's decision * * * [a contention]

3. The Federal District Court had jurisdiction of this common-law action because of the diversity of citizenship of the parties.

> inconsistent with the Act's terms, purposes and legislative history." *Elgin J. & E.R. Co. v. Burley*, 325 U.S. 711, 720-721, 65 S.Ct. 1282, 1288 [89 L.Ed. 1886, 1892]. 360 U.S. at 616-17, 79 S.Ct. at 1359-60, 3 L.Ed.2d at 1469-70.

Thus, the Majority made it clear that an employee who contests his employer's conduct in NRAB proceedings should not be given access to the courts to relitigate the same dispute in a commonlaw action for damages.

The Dissenting Justices in the *Union Pacific Railroad Company* case raised the same rationale that the Appellants assert before us in the instant appeal—that the claims in issue were for money damages in a separate cause of action, and not for the type of collective bargaining relief, including backpay, as might be available from the NRAB. In expressing that view, the Dissenters relied in part upon the holding in *Moore v. Illinois Central Railroad Co.*, 312 U.S. 630, 61 S.Ct. 754, 85 L.Ed. 1089 (1941). *Moore* was a case in which it was held that a railroad employee who was discharged could elect to challenge his employer's alleged breach of the employment contract in a state court contract action, rather than take it before the NRAB. Basically, the conclusion of the Court in *Moore* was that the procedures for the resolution of "minor disputes" under the Railway Labor Act were optional, rather than compulsory.

The holding of *Moore* was reexamined in *Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320, 92 S.Ct. 1562, 32 L.Ed.2d 95 (1972), and was expressly overruled. The *Andrews* case provides illustrative guidance in the instant case. In *Andrews*, as in *Moore*, the railway employee instituted a court action seeking damages for wrongful discharge.[4] He had not previously resorted to procedures before the NRAB. In overruling *Moore*, and directing the employee to avail himself of the NRAB procedure for the resolution of his claims, the Majority in *Andrews* discussed the policy of requiring the

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4. Although in Andrews, the suit was initiated in the Georgia state courts, it was removed to the United States District Court at its inception.

exhaustion of administrative remedies. In doing so, the Majority declared:

> The term "exhaustion of administrative remedies" in its broader sense may be an entirely appropriate description of the obligation of both the employee and carrier under the Railway Labor Act to resort to dispute settlement procedures provided by that Act. It is clear, however, that in at least some situations the Act makes the federal administrative remedy *exclusive*, rather than merely requiring exhaustion of remedies in one forum before resorting to another. *A party who has litigated an issue before the Adjustment Board on the merits may not relitigate that issue in an independent judicial proceeding.* * * * He is limited to the judicial review of the Board's proceedings that the Act itself provides. * * * In such a case the proceedings afforded by 45 U.S.C. § 153 First (i), will be the *only remedy available to the aggrieved party*. 406 U.S. at 325, 92 S.Ct. at 1565, 32 L.Ed.2d at 100. (citations omitted; emphasis supplied)

Thus, the Majority of the Court in *Andrews* made it clear that after a railway employee dispute has been presented to the NRAB for resolution, an employee who has been a party to such proceedings may not attempt to relitigate the dispute in court.

The precedental value of the Majority holding in *Andrews* to the resolution of the issues in dispute in the instant appeal is made more evident by a referral to Justice Douglas' Dissenting Opinion in *Andrews*. Justice Douglas went to great pains to explain that the employee in the case was not seeking a collective bargaining remedy, but rather sought damages because of his employer's alleged wrongful conduct under Georgia contract law. Clearly, the Supreme Court Majority found that argument to lack merit. One cannot fail to draw an analogy between the arguments proferred by the Appellants in the instant case and the unsuccessful position taken by the employee in *Andrews*. Unfortunately for the Appellants, the Majority of the Supreme Court, to which we must adhere,

found that railway employees are bound by statute to initially direct such disputes to the NRAB, and cannot thereafter relitigate such disputes under state common-law theories.

Other Federal Court decisions in comparable situations also provide guidance to us suggesting the correctness of the decision reached by the Delaware County Court in this case. In *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir. 1978), cert. denied, 439 U.S. 930, 99 S.Ct. 318, 58 L.Ed.2d 323 (1978), a discharged employee instituted an action in state court, later removed to Federal Court, asserting that he was entitled to damages for the intentional infliction of emotional distress from his employer, arising from the circumstances of his discharge. The Court determined that the plaintiff employee's claims were either arguably covered by or even had a " 'not obviously insubstantial' relationship to the labor contract." *Magnuson, Id.* at 1369. Thus, the Court held that the claims had to be classified as a "minor dispute", subject to the administrative process allowing resolution by the NRAB.

A similar conclusion was reached by the United States District Court for South Carolina in *Carson v. Southern Railway Company*, 494 F.Supp. 1104 (D.C.S.C.1979), a case in which the employee brought a defamation action against his railway employer as a result of alleged statements by a supervisor that the employee was intoxicated on duty. In reliance upon the Supreme Court's *Andrews* decision, the District Court held that even though the action was instituted on state common-law grounds seeking damages, it had to be categorized as a "minor dispute" because it evolved out of an employment disagreement in which the terms of the applicable collective bargaining agreement, relating to the employee intoxication, had to be considered.

A factual situation highly analogous to that presented in this appeal was evident in *McKinney v. International Association of Machinists*, 624 F.2d 745 (6th Cir. 1980). In that case a group of railroad employees sued their employer and their union. They asserted that they had entered a training program after being assured by their employer that this was the

only route whereby they could obtain seniority and journeyman mechanic status. They were also advised by the employer that it would not directly hire journeymen off of the street, except in an emergency situation. Notwithstanding such alleged promises, the employer hired several others as journeyman mechanics, in non-emergency circumstances. Several of these newly-hired individuals, pursuant to a subsequent agreement between the employer and the union, were established as journeymen mechanics. The plaintiffs thereupon filed a breach of contract claim against the employer, asserting that the newly-hired employees were wrongfully promoted ahead of the plaintiffs, and in violation of the plaintiffs' agreements with the employer. The plaintiffs asserted that the employer's conduct cost them the loss of salary and job seniority. With respect to the union, their suit claimed a breach of the duty of fair representation.

The District Court[5] in *McKinney* held that the plaintiffs' claims against the employer must be held to constitute a "minor dispute" under the Railway Labor Act, thereby vesting the NRAB with primary and exclusive jurisdiction over the controversy. The Court of Appeals affirmed on the same rationale. In doing so, it pointed out that the seniority issue in dispute was dealt with in the collective bargaining agreement between the employer and the union. Thus, since the resolution of the problem would involve the terms of the collective bargaining agreement or interpretations thereof, the Court of Appeals ruled that it must be considered a "minor dispute", subject to the primary and exclusive jurisdiction of the NRAB.

All of these precedents require the same conclusion here. Employees of a railway are placed in a special legal position with regard to disputes with a railway employer. The legislation described above, and applicable court decisions, make it clear that such employees must submit any dispute which may include the analysis of collective bargaining agreements

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5. This is another case which was initiated in state court but then removed to the Federal courts.

and the rights of employees covered by them, to the administrative processes of the NRAB. It is impossible to evaluate the Appellants' contract claims in this case without reference to their rights under the applicable collective bargaining agreement. Moreover, it cannot be ignored that NRAB has already passed upon the Appellants' contentions that their contract rights were violated by the Appellee's conduct. They cannot relitigate such arguments in a different form of action in our courts. Therefore, it is evident that the Delaware County Court of Common Pleas acted properly in vacating its earlier verdict for the Appellants, and in rendering judgment n.o.v. to the Appellee, on jurisdictional grounds.

The order of the lower court is hereby affirmed.

IN THE SUPERIOR COURT OF PENNSYLVANIA

LIEUT. THOMAS CUMMINGS; LIEUT. JOHN GALLAGHER; LIEUT. RONALD STACHOWSKI; LIEUT. WILLIAM BOLAND; LIEUT. STEPHEN McGOVERN; LIEUT. JOHN RYAN; LIEUT. KURT KEMMESSIES; LIEUT. MICHAEL AMICO; SGT. NEVILLE BOOTH; LIEUT. MICHAEL SERFESS; LIEUT. LAWRENCE CLARK; LIEUT. JOHN RIGGIN; LIEUT. HAROLD PLUDE; LIEUT. ROBERT SLIMBOCK; LIEUT. HARRY HALBE; LIEUT. JOHN GRIFFIN; SGT. VAUGHN CARVER; SGT. CHARLES YAGER; SGT. GERALD ADAMS; SGT. STEPHEN WARNER; SGT. CARL GUSTAFSON; SGT. RICHARD YOST; SGT. ROBERT CROWLEY; SGT. FRANK RAPINESI; SGT. ROBERT COULSON,	)	No. 3634 Philadelphia, 1982
Appellants	)	
v.	)	
NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK),	)	
Appellee.	)	

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Delaware County be, and the same is hereby affirmed.

BY THE COURT:

J. Haniel Henry
PROTHONOTARY

Dated: April 19, 1985

IN THE COURT OF COMMON PLEAS
OF DELAWARE COUNTY, PENNSYLVANIA

CIVIL ACTION—LAW

LT. THOMAS CUMMINGS, *et al*, *Plaintiffs*	:	NO. 78-12717
v.	:	
NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK) *Defendant*	:	IN ASSUMPSIT

Alexander A. DiSanti, Esquire and
John M. Gallagher, Esquire, Attorneys for Plaintiffs
Allen J. Gross, Esquire, Attorney for Defendant

ORDER

LABRUM, J. FILED: 12/9//82

AND NOW, this 9th day of December, 1982, upon consideration of briefs and arguments submitted by respective Counsel before this Court, it is ORDERED and DECREED that Plaintiffs' Petition for Reconsideration is Dismissed and the Order of this Court entered September 20, 1982 is hereby Affirmed.

BY THE COURT:

JOSEPH T. LABRUM, JR., JUDGE

IN THE COURT OF COMMON PLEAS
OF DELAWARE COUNTY, PENNSYLVANIA

CIVIL ACTION—LAW

LT. THOMAS CUMMINGS, *et al,*	:	CIVIL ACTION
	:	NO. 78-12717
Plaintiffs	:	
	:	ATTORNEY I.D.
v.	:	#02155
	:	
NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK),	:	
	:	IN
Defendant	:	ASSUMPSIT

ORDER

AND NOW, this 19th day of October, 1982, the Court hereby grants Plaintiffs' Motion for Reconsideration of its Order of September 20, 1982, sustaining Defendant's Exceptions to the Verdict herein.

BY THE COURT:

_____

JOSEPH T. LABRUM, JR., JUDGE

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA

CIVIL ACTION—LAW

LIEUTENANT THOMAS CUMMINGS, *et al,* *Plaintiffs*	:	NO. 78-012717
vs.	:	
NATIONAL RAILROAD PASSENGER CORP. (AMTRAK), *Defendant*	:	IN ASSUMPSIT

John M. Gallagher, Jr., Esquire, Attorney for Plaintiffs
Francis X. Brennan, Esquire, Attorney for Defendant
Allen J. Gross, Esquire, Attorney for Defendant

OPINION

LABRUM, J. FILED: 9/20/82

In August of 1978, the Plaintiffs filed a Complaint alleging that Defendant National Railroad Passenger Corporation, (AMTRAK) had breached various contracts for permanent employment which it had entered into with the Plaintiffs, thereby causing Plaintiffs to lose income and benefits and to suffer embarrassment and humiliation.

On September 8, 1981, the matter was tried before the Court without a jury. On October 2, 1981, the Court issued a Verdict setting forth various Findings of Fact and granting the Plaintiffs various sums for lost salary and special damages, which aggregated in excess of Eight Hundred Ninety Thousand Dollars ($890,000). The Defendant filed timely exceptions to the Verdict.

For the first time in the proceedings, at the filing of Exceptions, the Defendant raised the issue of this Court lacking subject matter jurisdiction over the Plaintiffs claim against AMTRAK because those claims state a minor dispute

under the Railway Labor Act which is subject to the exclusive jurisdiction of a National Railroad Adjustment Board whose decisions are final and binding. The Court must address this jurisdictional question before proceeding on the merits.

Beginning in October 1976, the Plaintiffs were recruited by AMTRAK to fill the supervisory positions of Lieutenant and Sergeant in its Police Department. The evidence indicates that representations were made to the Plaintiffs by AMTRAK representatives regarding permanent supervisory positions, with the likelihood for advancement to higher ranks.

On August 12, 1976, AMTRAK entered into an agreement with Local Union 732 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America ("Local 732"), which agreement governed the employment terms and conditions of AMTRAK's police employees below the rank of Captain including the exclusive procedure for the selection and promotion for Sergeant and Lieutenant positions.

A few months after employment began, the Plaintiffs were informed of the fact that the promotional scheme provided for in the collective bargaining agreement required them to take a promotional examination which would be graded on a pass-fail basis. All individuals who passed the examination would be appointed to supervisory ranks, depending on their seniority with Local 732. Since all of the patrolmen had joined AMTRAK by conveying over from another rail carrier, bringing their union seniority with them, and since the patrolmen were hired several days or weeks prior to the hiring of the Plaintiffs, all of the patrolmen had higher seniority with the union than the Plaintiffs. For this and various other reasons, the Plaintiffs felt that they were being treated unfairly and refused to take the test. AMTRAK accordingly determined that refusal to take the examination made the Plaintiffs ineligible to retain their positions. On May 9, 1978, the Plaintiffs were notified by AMTRAK that they would be demoted effective May 16, 1978. The Plaintiffs filed an action in the United States District Court for the Eastern District of Pennsylvania

challenging their demotions and requesting that the demotions be enjoined. The Federal District Court dismissed the Plaintiffs complaint on the grounds that the dispute in question was within the exclusive jurisdiction of the National Railroad Adjustment Board (NRAB). Accordingly, the Plaintiffs were demoted on May 18, 1978.

Subsequent to the demotions, Plaintiffs filed grievances challenging AMTRAK's actions. At that time, the Plaintiffs also instituted the present action. The grievances were subsequently denied.

The Plaintiffs further challenged their demotions by filing Statements of Claim with the NRAB, under the Railway Labor Act. (RLA). The parties stipulated that this procedure before the NRAB is the sole and exclusive procedure available to the Plaintiffs and the decisions of the NRAB are final and binding. On October 7, 1980, the NRAB rejected the Plaintiffs claims. The Board found that the Plaintiffs were subject to the terms of the collective bargaining agreement entered into between AMTRAK and Local 732. The Board further held that AMTRAK acted properly in applying the promotional examination provisions of Article No. 2 of the agreement and in demoting the Plaintiffs. The Plaintiffs did not request the Federal District Court to review the decision of the NRAB.

As was stated previously, at no time during the pre-trial proceedings or during the trial itself did the Defendant raise the challenge to this Court's jurisdiction over this case. However, an objection to the lack of subject matter jurisdiction is never lost by waiver, estoppel or consent; it may be raised at any stage of a proceeding, even at the appellate level, by the parties or even by a Court on its own motion. *Husted v. Board of Directors*, Wellsboro Area School District, 57 Pa. Cmwlth. 520, 427 A.2d 272 (1981). Therefore, although we are at the stage of exceptions to the Court's Verdict in this matter, the Defendant is not precluded from raising the Court's lack of subject matter jurisdiction.

We have seriously reviewed this question of the Court's jurisdiction and are of the opinion that the Defendant's position must be sustained.

AMTRAK as a common carrier by rail is subject to the RLA. Disputes between employers subject to the Act and their employees are governed by the provisions of the Act. One category of disputes so governed by the Act are "minor disputes", which constitute any disputes arising out of the interpretation or application of an existing collective bargaining agreement and encompass any grievance or claim grounded in vested or accrued rights. *Elgin, J. and E. R. Co. v. Burley*, 325 U.S. 711, 89 L. Ed 1886, 65 S. Ct. 1282 (1945). The Act provides for the final and binding resolution of minor disputes before the NRAB and the United States Supreme Court has stated that the NRAB's jurisdiction over such minor disputes is exclusive. 45 U.S.C. 153; *Andrews v. Louisville & N. R. R.*, 406 U.S. 320, 32 L. Ed. 2d 95, 92 S. Ct. 1562 (1972). Neither State nor Federal Courts have the power to invade the jurisdiction conferred on the NRAB. *Slocum v. Delaware*, 339 U.S. 239, 94 L. Ed. 795, 70 S. Ct. 577 (1950).

Plaintiffs claim in this Court is based upon a dissatisfaction with the manner in which an existing collective bargaining agreement was applied to them. That identical claim was presented to the NRAB in 1980 and was resolved in favor of the Defendant by the Board in its October 7, 1980 award. Although the Plaintiffs couch their claim as one in common law for breach of contract, the case law provides that the NRAB has exclusive jurisdiction over a dispute such as the matter before this Court. *Union Pacific V. Price*, 360 U.S. 601, 3 L. Ed. 2d 1460, 79 S. Ct. 1351 (1959).

As stated by the Supreme Court in *Union Pacific V. Price:*

> "The statutory language . . . makes clear . . . that Congress barred the employees subsequent resort to the common law remedy after an adverse determination of his grievance by the Adjustment Board."
>
> 360 U.S. 608–09

The Plaintiffs in this case dispute the fact that the issues presented categorize a "minor claim" under the Act. However, the factual situations as presented in the case law cited in this Opinion indicate that the Supreme Court has determined that

a dispute as to improper demotion under a collective bargaining agreement indeed constitutes a "minor dispute."

The rationale in *Union Pacific v. Price* and *Andrews v. Louisville and N. R. R.* is not limited to actions claiming wrongful discharge. Characterizing an employment grievance as an action for intentional infliction of emotional distress, defamation or malicious deprivation of benefits is not sufficient to avoid the decisions of the United States Supreme Court.

It must be noted that the cases cited by the Plaintiffs are those in which the Federal District Courts were given jurisdiction in very narrow circumstances over agency decisions. We have not been presented with any authority permitting such jurisdiction to be vested in State Courts.

The Plaintiffs also argue that this Court has subject matter jurisdiction over the claim because of the following facts:

1. The Union had no interest in seeing that the Plaintiffs keep their positions;

2. The composition of the NRAB prejudices any claims that would be brought to it by Plaintiffs;

3. The NRAB's perception of its statutory duty emphasizes the importance of collective bargaining agreements to the exclusion of individual rights;

4. The issues raised by this case are not issues peculiarly susceptible to resolution by application of the "law of the shop"; and

5. The NRAB's decision in this case itself demonstrates the Board is not a suitable tribunal in which to enforce the Plaintiffs rights.

We can not accept these arguments as valid because they have no bearing upon the question of this Court's subject matter jurisdiction. If the Plaintiffs wanted to pursue their challenge of the decision on the above facts, they had redress to the Federal District Court, which has sole jurisdiction over such an appeal under the provisions of the Railway Labor Act.

Finally, the Plaintiffs contend that their position can be sustained in accordance with *Barrentine v. Arkansas-Best*

Freight System, 450 U.S. 728, 667 L. Ed. 2d 641, 101 S. Ct. 1437, (1980). However, a reading of this case indicates that it is distinguishable on the facts and the law presented. In *Barrentine,* the Supreme Court held that a party could have access to the Federal District Court to question provisions of the Fair Labor Standards Act. In the present case, the Plaintiffs are not alleging a violation of the Federal statute as to which there is a right to bring an action in a District Court, rather the Plaintiffs are seeking redress for breach of an alleged agreement incidental to their employment and for which there is a mandated Federal procedure.

For the foregoing reasons, we must hold, even at this point, that this Court lacks the subject matter jurisdiction to determine this case.

Accordingly, we enter the following:

ORDER

And now this 20th day of September, 1982, upon consideration of Briefs and Arguments submitted by respective Counsel before this Court en banc, it is ORDERED and DECREED that the Defendant's exceptions to the Court's Verdict be and the same are hereby Sustained, the Verdict of October 2, 1981 is hereby set aside and Judgment N.O.V. is hereby entered in favor of the Defendant.

BY THE COURT:

_____

JOSEPH T. LABRUM, JR.
JUDGE

IN THE COURT OF COMMON PLEAS
OF DELAWARE COUNTY, PENNSYLVANIA

CIVIL ACTION—LAW

LIEUTENANT THOMAS CUMMINGS, *et al*, *Plaintiffs*	:	NO. 78-012717
v.	:	
NATIONAL RAILROAD PASSENGER CORP. (AMTRAK), *Defendant*	:	IN ASSUMPSIT

John M. Gallagher, Jr., Esquire, Attorney for Plaintiffs
Francis X. Brennan, Esquire, Attorney for Defendant
Allen J. Gross, Esquire, Attorney for Defendant

ORDER

LABRUM, J. FILED: 9/20/82

AND NOW, this 20th day of September, 1982, upon consideration of Briefs and Arguments submitted by respective Counsel before this Court en banc, it is ORDERED and DECREED that the Defendant's exceptions to the Court's Verdict be and the same are hereby Sustained, the Verdict of October 2, 1981 is hereby set aside and Judgment N.O.V. is hereby entered in favor of the Defendant.

BY THE COURT:

JOSEPH T. LABRUM, JR.
JUDGE

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA

CIVIL ACTION—LAW

LIEUT. THOMAS CUMMINGS, *et al.*, *Plaintiffs*	:	NO. 78-12717
vs.	:	
NATIONAL RAILROAD PASSENGER CORP. (AMTRAK), *Defendant*	:	IN ASSUMPSIT

John M. Gallagher, Jr., Esquire, Attorney for Plaintiffs
Francis X. Brennan, Esquire, Attorney for Defendant

VERDICT

LABRUM, J. FILED: 10/2/81

And Now October 2nd, 1981, following Trial without Jury September 8, 1981 through September 10, 1981 and after consideration of Argument and briefs of counsel the Court finds:

1. That as to each of the Plaintiffs in the within action there existed an Oral Contract of employment with the Defendant, and

2. That in the case of each Plaintiff the contracts were permanent in nature and terminable by Defendant for just cause; and

3. That each of the Plaintiffs were improperly demoted by Defendant constituting a breach of each of said oral contracts of employment and; that

4. Each of the Plaintiffs relinquished substantial rights and benefits of prior employment in order to accept the offer of permanent by Defendant and; that

5. Each Plaintiff is entitled to his loss of income from the date of his demotion until the date of this verdict and; that

6. The Defendant knew or should have known, having reason therefore that at the time of the oral contract that a breach thereof would cause mental anguish to each Plaintiff as a probable and forseeable result of that breach and; that

7. Each Plaintiff is entitled to recover special damages for mental suffering caused by the said breach of each of each oral contract and

8. The following verdicts are accordingly entered, in favor of:

(a)	Thomas P. Cummings	
	(1) Salary loss	$ 6,567.00
	(2) Special damages	7,000.00
		Total—$13,567.00
(b)	Michael J. Amico	
	(1) Salary loss	$ 7,195.11
	(2) Special damages	8,000.00
		Total—$15,195.11
(c)	John F. Gallagher, Jr.	
	(1) Salary and Vacation loss	$17,591.46
	(2) Special damages	12,000.00
		Total—$29,591.46
(d)	Ronald Stachowski	
	(1) Salary loss	$ 5,974.00
	(2) Special damages	7,000.00
		Total—$12,974.00
(e)	William F. Boland	
	(1) Salary loss	$15,254.00
	(2) Special damages	10,000.00
		Total—$25,254.00
(f)	Steven D. McGovern	
	(1) Salary loss	$15,965.00
	(2) Special damages	15,000.00
		Total—$30,965.00

(g) John W. Ryan

(1) Salary and Vacation loss	$10,363.46
(2) Special damages	10,000.00
Total—	$20,363.46

(h) Neville A. Booth, Jr.

(1) Salary and Vacation loss	$ 5,979.14
(2) Special damages	15,000.00
Total—	$20,979.14

(i) Kurt Kemmesie

(1) Salary loss and expenses	$ 7,153.03
(2) Special damages	12,000.00
Total—	$19,153.03

(j) Michael Serfess

(1) Salary and Vacation loss	$12,609.90
(2) Special damages	15,000.00
Total—	$27,609.90

(k) John A. Riggin

(1) Salary and Vacation loss	$14,117.84
(2) Special damages	10,000.00
Total—	$24,117.84

(l) Harold Plude

(1) Salary and Vacation loss	$21,997.46
(2) Special damages	15,000.00
Total—	$36,997.46

(m) Lawrence C. Clark

(1) Salary and Vacation loss	$22,515.84
(2) Special damages	20,000.00
Total—	$42,515.84

(n) Gerald Adams

(1) Salary and Vacation loss	$26,528.50
(2) Special damages	25,000.00
Total—	$51,528.50

(o) Vaughan Carver

(1) Salary and Vacation loss	$29,632.73
(2) Special damages	20,000.00
Total—	$49,632.73

(p) Robert W. Coulson

(1) Salary and Vacation loss	$22,816.66
(2) Special damages	20,000.00
Total—	$42,816.66

(q) Robert Crowley

(1) Salary and Vacation loss	$28,224.40
(2) Special damages	15,000.00
Total—	$43,224.40

(r) John J. Griffin

(1) Salary and Vacation loss	$21,504.52
(2) Special damages	20,000.00
Total—	$41,504.52

(s) Harry Halbe

(1) Salary and Vacation loss	$26,525.01
(2) Special damages	30,000.00
Total—	$56,525.01

(t) Frank Rapinesi

(1) Salary and Vacation loss	$27,301.68
(2) Special damages	25,000.00
Total—	$52,301.68

(u) Robert Slimbock

(1) Salary and Vacation loss	$29,626.00
(2) Special damages	10,000.00
Total—	$39,626.00

(v) Charles J. Yager

(1) Salary and Vacation loss	$25,431.81
(2) Special damages	25,000.00
Total—	$50,431.81

(w) Carl J. Gustafson

(1) Salary and Vacation loss	$16,683.00
(2) Special damages	22,000.00
Total—	$38,683.00

(x) Richard Yost

(1) Salary and Vacation loss	$16,993.05
(2) Special damages	60,000.00
Total—	$76,993.05

(y) Barry Warner

(1) Salary and Vacation loss	$ 9,539.55
(2) Special damages	20,000.00
Total—	$29,539.55

And it is so Ordered.

BY THE COURT:

JOSEPH T. LABRUM, JR.
JUDGE

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION

Award Number 3778
Docket Number 3654

Referee Paul C. Carter

PARTIES TO DISPUTE:

Former Liet. Thomas Cummings, et al., All Police Officers formerly holding promotional ranks in the Amtrak Police Department.

National Railroad Passenger Corporation

STATEMENT OF CLAIM:

The employees listed as parties were demoted from their supervisory ranks in the Amtrak Police Department on May 16, 1978. The carrier took the position that the supervisory positions in which the employees had been hired were only temporary, and that the employees could not qualify for continued tenure in the positions. The employees contend that they were hired into permanent supervisory positions, not subject to demotion and subject only to promotion during the faithful performance of their duties. The employees claim entitlement to reinstatement into the supervisory positions which they formerly held, with full reimbursement for all back pay that they have lost as a consequence of their demotion.

OPINION OF BOARD:

The claim has been submitted to this Board on behalf of thirty named Police Officers in the National Railroad Passenger Corporation (Amtrak) Police Department. It is questionable that claims in behalf of some of the named individuals were properly handled on the property in accordance with the provisions of the Railway Labor Act; however, as all involve the same basic issue, the Board's decision will be applicable to all the claimants.

The record shows that prior to submission to this Board,

there was considerable litigation in the United States District Court for the Eastern District of Pennsylvania. The civil actions were dismissed by the Court on the basis that exclusive jurisdiction of the controversy rested with the National Railroad Adjustment Board.

The record shows that the *transfer* of employes from Conrail to Amtrak was specifically provided for in Section 504(f) of the Amended Rail Reorganization Act of 1976. Under Section 504(f)(2) of the Act, if after sixty days a new Agreement had not been negotiated, "the bargaining agreement in existence on the rail properties from which the employes are to be transferred . . . will be put into effect." The applicable Agreement in effect was the Agreement with Local 732 of the International Brotherhood of Teamsters, which Agreement contained a provision requiring promotion examinations under Article 2, which reads:

"ARTICLE 2
PROMOTIONS

Pursuant to this Article, patrolmen shall be promoted to sergeants and sergeants shall be promoted to lieutenants.
Section 1 (effective 1-10-75)
Provided there are no more than four names on the Sergeant promotion list or no more than four names on the lieutenant promotions list, promotion tests for each class shall be given in each seniority district on the first Tuesday of April and October in the Office of the Captain of Police. Police officers desiring to take the test shall notify the Captain of Police, in writing, no later than the 15th day of the preceding month.

(a) Promotion tests will be prepared in the office of the Assistant Vice President-Security and will be used only in accordance with this Section 1.
(b) The written notice received by the Captain of Police, as referred to above, will be sent to the Assistant Vice President-Security.
(c) Sealed test will be sent to the Captain of Police where the test will be taken and will be delivered sealed to

that Police Officer taking the test at the time he reports for that purpose and he shall be advised of the score required to pass the test.

(d) The candidate for promotion will open the sealed envelope, complete the test, place it back in another envelope that will be included, and return the envelope sealed to the officer at the testing location.

(e) The completed test in the sealed envelope will be sent to the Assistant Vice President-Security where it will be reviewed and graded.

(f) Police officers taking the test for Lieutenant or Sergeant shall be notified promptly of their grade and those passing the test will be placed on a promotion list for that rank subject to promotion to the higher rank.

(g) Police officers passing the test shall be placed on the promotion list for their seniority district in seniority order. Police officers subsequently added to the list will be assigned in seniority order within their group added to the list at that time but shall be placed behind those already on the list."

The claimants entered the service of the Carrier during the period that the Agreement with Local 752 of the International Brotherhood of Teamsters was in effect. Contending that they were employed in the ranks of Lieutenants and Sergeants, claimants objected to being subjected to the promotional examinations provided for in Article 2 of the Agreement above quoted. They sought unsuccessfully through proceedings before the National Mediation Board to change representation of Police Department employes of the Northeast Corridor of the National Railroad Passenger Corporation. They also sought legal relief from being subjected to the promotional examinations.

The contention is made in behalf of each claimant that at the time they were employed as Lieutenants or Sergeants each was told that his tenure in such supervisory positions would be permanent.

When the claimants were employed they became subject to the Agreement then in effect covering Police Department employes, including Article 2 of that Agreement. It is well settled that Carriers cannot properly enter into individual employment contracts contrary to the provisions of the applicable collective bargaining Agreement. In Third Division Award Nos. 20581 it was held:

> "What are the rights of the Carrier in entering into individual employment contracts? There have been cited to us two United States Supreme Court cases which dealt with this issue, J. I. Case Co. v. National Labor Relations Board, 321 U. S. 332 and Order of Railroad Telegraphers v. Railway Express Agency, 321 U. S. 342. Both of the cases have held that the collective bargaining agreement must take precedence over contracts with individual employes."

See also Third Division Awards 22492,21048.

Based upon the entire record, the Board finds that the Carrier's actions in applying the promotional examination provisions of Article 2 of the Agreement in effect at the time were proper. The claims before the Board will, therefore, be denied.

FINDINGS:

The Fourth Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier and the employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were granted the privilege of appearing before the Division, with the Referee sitting as a member thereof, to present oral argument.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

ATTEST:

Executive Secretary
National Railroad Adjustment Board

By: _____
Assistant Executive Secretary

Dated at Chicago, Illinois, this 7th day of October 1980.

Form 2(a)

NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION

ORDER

To accompany (Award Number 3779
(Docket Number 3732

Mr. J. M. Gallagher, Jr., Attorney
Richard, Brian, DiSanti & Hamilton
110 Front Street
Media, Pennsylvania 19064

The Division, after consideration of the Docket identified above, hereby orders that an award favorable to the petitioner should not be made. The claim is denied as set forth in the Award, a copy of which is attached and made a part of this Order.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

ATTEST: Executive Secretary
National Railroad Adjustment Board

By _____
Assistant Executive Secretary

Dated at Chicago, Illinois, this 7th day of October, 1980.

Copy to: Mr. S. H. Heltzinger, Director-Labor Relations
National Railroad Passenger Corporation
1617 JFK Boulevard
Philadelphia, Pennsylvania 19063

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION

Award Number 3779
Docket Number 3732

Referee Paul C. Carter

PARTIES TO DISPUTE:

Robert Bagosy

National Railroad Passenger Corporation

STATEMENT OF CLAIM:

Like the employees listed as parties in Ex Parte Submission Docket #3654 (Cummings, et al vs. National Railroad Passenger Corporation), Employee Bagosy was demoted from his supervisory rank in the Amtrak Police Department. However, unlike the other employees, Employee Bagosy was not demoted on May 16, 1978. The reason why Mr. Bagosy was not demoted, was that on May 16, 1978, Employee Bagosy held the rank of Captain of Police in charge of the Carrier's Wilmington, Delaware field office. Attached hereto as Exhibit "n" is an inter-office memorandum of the Carrier recording the fact that Employee Bagosy was promoted to the rank of Captain of Police. Captain of Police is a management rank and accordingly, on May 16, 1978, when all of the other promotional employees in the Carrier's police department were demoted, Bagosy was not demoted.

Bagosy's demotion did not occur until October 25, 1978. Attached hereto as Exhibit "O" is a letter from J. A. Harris, Director of Security of the Carrier, dated October 25, 1978, informing Employee Bagosy of his demotion for budgetary and organizational reasons. At that point, Bagosy did not automatically revert to his former rank of Lieutenant, but rather was forced to exercise seniority, in accordance with then existing agreement between non-management Amtrak Police (those holding the rank of Lieutenant or below) and the Carrier. Attached hereto as Exhibit "P" is a document by which Employee Bagosy attempted to exercise seniority. Be-

cause the Carrier took the position that Bagosy had no seniority in the rank of Lieutenant, on the ground that he was only "acting Lieutenant", Bagosy was not permitted to exercise seniority and was demoted completely to the rank of Patrolman.

The affidavit of Employee Bagosy recounting the details of his hiring, promotion and demotion by the Carrier is attached as Exhibit "G" to the Ex Parte Submission of Cummings, et al vs. National Railroad Passenger Corporation, NARB Docket #3654, and is here incorporated by reference.

Bagosy filed a timely grievance with the Carrier, which was denied by the Carrier on the ground that Employee Bagosy held the rank of Lieutenant only in an acting or temporary capacity. See letter of the Carrier's Labor Relations Officer, J. J. Kelly, Jr., dated March 20, 1979, attached hereto as Exhibit "Q". Bagosy promptly requested his union, the Patrolman's Benevolent Association (P.B.A.), to process his grievance to the next highest step (see Exhibit "R", attached hereto). When the union took no action to appeal Bagosy's grievance, Bagosy retained private counsel, John M. Gallagher, Jr., Esquire, who on May 16, 1979, processed the grievance to the next step by writing to S. H. Heltzinger, Director of Labor Relations for the Carrier (see Exhibit "S", attached hereto.).

Notwithstanding the fact that Mr. Gallagher's letter was well within the time allowed for appealing the grievance to the next step, Mr. Heltzinger took no further action on the grievance. As required by the agreement between the union and the Carrier, within sixty (60) days of submitting the grievance to Mr. Heltzinger, and after having received no official action from Mr. Heltzinger, Employee Bagosy, through his attorney, appealed from this denial of relief by the Carrier to the National Railroad Adjustment Board, in Notice to the Board dated July 12, 1979.

OPINION OF BOARD:

This docket involves the same issues and similar conten-

tions as involved in Award 3778. For the reasons stated in Award 3778, the claim herein will be denied.

FINDINGS:

The Fourth Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier and the employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

The parties to said dispute were granted the privilege of appearing before the Division, with the Referee sitting as a member thereof, to present oral argument.

AWARD:

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

ATTEST:

Executive Secretary
National Railroad Adjustment Board

By: _____
Assistant Executive Secretary

Dated at Chicago, Illinois, this 7th day of October 1980.

Form 2(a)

NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION

ORDER

To accompany (Award Number 3780
(Docket Number 3733

Mr. J. M. Gallagher, Jr., Attorney
Richard, Brian, DiSanti and Hamilton
110 Front Street
Media, Pennsylvania 19064

The Division, after consideration of the Docket identified above, hereby orders that an award favorable to the petitioner should not be made. The claim is denied as set forth in the Award, a copy of which is attached and made a part of this Order.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

ATTEST: Executive Secretary
National Railroad Adjustment Board

By _____
Assistant Executive Secretary

Dated at Chicago, Illinois, this 7th day of October, 1980.

Copy to: Mr. S. H. Heltzinger, Director-Labor Relations
National Railroad Passenger Corporation
1617 JFK Boulevard
Philadelphia, Pennsylvania 19063

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION

Award Number 3780
Docket Number 3733

Referee Paul C. Carter

PARTIES TO DISPUTE:

Former Lieuts. John A. Riggin, Harold E. Plude and Lawrence C. Clark

National Railroad Passenger Corporation

STATEMENT OF CLAIM:

Employees Riggin, Plude and Clark are in the identical position as the employees in the case of Cummings, et al vs. National Railroad Passenger Corporation (NRAB Docket #3654), and accordingly, adopt herein by reference the Statement of Claims, Statement of Facts, and Position of Employees as was set forth in the Ex Parte Submission filed in that earlier case. The only difference between the position of Employees Riggin, Plude and Clark and the other employees in Case Docket #3654 is that the grievances filed by Riggin, Plude and Clark were not disposed of until May 2, 1979. Employees Riggin, Plude and Clark were listed as parties in the case of Cummings, et al vs. National Railroad Passenger Corporation because, at the time of the preparation of the Ex Parte Submission in that case, it was not clear that the grievances of Riggin, Plude and Clark had not been disposed of. When Riggin, Plude and Clark finally learned that their grievances had been denied on May 2, 1979, their representative, John M. Gallagher, Jr., processed their cases from that date on, in order to fully protect their rights.

Riggin, Plude and Clark were, like the other employees, demoted from their supervisory positions on May 16, 1978. They promptly filed grievances (see Exhibits "T" and "U", attached hereto and incorporated herein by reference). The grievances went through the normal grievance procedure (see Exhibit "V", attached hereto), but apparently the griev-

ances were held in abeyance by agreement between the Carrier and the union, in order to allow discussion of the promotion issue common to each of the claims (see Exhibit "W", attached hereto). The grievances of Employees Plude and Clark were finally denied by letter dated May 2, 1979. Although this letter the employees, its existence was acknowledged by S. H. Heltzinger, Director of Labor Relations for the Carrier, in his letter of May 21, 1979 to the employees' representative, John M. Gallagher, Jr., Esq. (see Exhibit "W", attached hereto). On May 24, 1979 the employees' representative, Mr. Gallagher, wrote to Mr. Heltzsinger requesting that the cases of Employees Riggin, Plude and Clark be listed for discussion at the next level, within sixty (60) calendar days of the date on which the grievances were denied, May 2, 1979 (see Exhibit "X", attached hereto). From May 24, 1979 to July 5, 1979, the employees' representatives heard nothing from Mr. Heltzinger, and accordingly, wrote to Mr. Heltzinger on July 5, 1979, informing him that his total silence during the sixty day period following the denial of the grievances on May 2, 1979 would have to be interpreted as a denial of the grievances at Mr. Heltzinger's level, and that accordingly, an appeal to the NARB would be prepared on behalf of the employees (see Exhibit "Y", attached hereto.)

On July 16, 1979 Mr. Heltzinger wrote to Mr. Gallagher, informing him that the Carrier had taken the position that it could not discuss the grievance with Mr. Gallagher, absent permission from the union, the Police Benevolent Association (see Exhibit "Z", attached hereto). Accordingly, on July 19, 1979, Mr. Gallagher filed on behalf of the employees a notice of intent to submit this Ex Parte Submission.

OPINION OF BOARD:

This docket involves the same issues and similar contentions as involved in Award 3778. For the reasons stated in Award 3778, the claim herein will be denied.

FINDINGS:

The Fourth Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier and the employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

The parties to said dispute were granted the privilege of appearing before the Division, with the Referee sitting as a member thereof, to present oral argument.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

ATTEST:

Executive Secretary
National Railroad Adjustment Board

By: _____
Assistant Executive Secretary

Dated at Chicago, Illinois, this 7th day of October 1980.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT SLIMBOCK, JOHN JOSEPH GRIFFIN AND VAUGHN F. CARVER, INDIVIDUALLY AND AS REPRESENTATIVES AND OFFICERS OF THE AMTRAK POLICE ASSOCIATION	:	CIVIL ACTION
v.	:	
NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)	:	NO. 78-1662
MICHAEL AMICO	:	CIVIL ACTION
v.	:	
NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK) and LOCAL 732, INTERNATIONAL BROTHERHOOD OF TEAMSTERS	:	NO. 77-3133

Before Hon. Joseph L. McGlynn, Jr., J.
Philadelphia, Pa. May 16, 1978

HEARING ON PLAINTIFF'S MOTION
FOR PRELIMINARY INJUNCTION

APPEARANCES:

JOHN GALLAGHER, ESQ.
for Plaintiffs

T. PACE SHARP, ESQ.
and
W. SCOTT ARMENTROUT, ESQ.
for AMTRAK

LAWRENCE GORDON, ESQ.
for Union

MR. GALLAGHER: Your Honor, just briefly, I don't think that these plaintiffs are required to go through the grievance procedure in the green book because it would be totally pointless to do that and the law doesn't require parties to do pointless acts.

When we were in front of Judge Broderick the other day AMTRAK wouldn't even agree to delay two or three days with the implementation of that promotional scheme until we had an opportunity to get back here.

It is clear that going through that grievance procedure would get us absolutely nothing and the only way we could preserve the status quo effectively was by coming into court.

MR. SHARP: Just for the record, sir, AMTRAK could not agree to it. We are bound by that agreement.

THE COURT: Well, in my judgment this is a dispute which relates to the meaning or the application of the promotional provision of the collective bargaining agreement and to that extent than it is considered a minor dispute as opposed to a major dispute which must go to the National Mediation Board.

As a minor dispute I don't have any jurisdiction and the exclusive jurisdiction over this type of dispute, which is in effect a grievance, is in the National Railroad Adjustment Board.

I think it is only in the case of a self help where a strike occurs that the Court has the jurisdiction to intervene in this type of agreement or this type of dispute, and by self help, as I understand the law, it means a strike.

Accordingly, I am going to deny your motion for a preliminary injunction and I am going to dismiss the complaint because I am without jurisdiction.

MR. GALLAGHER: If the Court please, with regard to the dismissal of the complaint, Your Honor, I do think that certainly is premature. It may be that we can develop facts through discovery that might tend to change Your Honor's mind on that.

THE COURT: No. I will dismiss the complaint because if I don't have jurisdiction, I don't have jurisdiction.

(Now, 11:59 a.m. court recesses.)

(Record closed.)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT SLIMBOCK, *et al*	:	CIVIL ACTION
	:	
v.	:	
	:	
NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK) and LOCAL 732, INTERNATIONAL BROTHERHOOD OF TEAMSTERS	:	NO. 76-3840
	:	
MICHAEL AMICO, *et al*	:	CIVIL ACTION
	:	
v.	:	
	:	
NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK) and LOCAL 732, INTERNATIONAL BROTHERHOOD OF TEAMSTERS	:	NO. 77-3133

MEMORANDUM OF DECISION

McGlynn, J. April 1978

This case arose out of a dispute between the plaintiffs who were police employees of the National Railroad Passenger Corporation (Amtrak) and the railroad over Amtrak's hiring and promotional policies. The plaintiffs were all hired by Amtrak at a specific rank, some as Lieutenant of Police and others as Sergeants of Police. At the time they were hired no indication was given to them that their positions were in any way temporary. Nevertheless, on August 12, 1976 Amtrak entered into an interim collective bargaining agreement with Local Union 732, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America (Local 732 IBT). This agreement contained a promotional scheme, the implementation of which would have caused plaintiffs to lose the ranks at which they were hired. The plaintiffs ob-

jected to being represented by Local 732 IBT and to the application to them of the interim bargaining agreement. They filed an application to have the dispute resolved under the auspices of the National Mediation Board. *See* 45 U.S.C. §§154 & 155. In order to preserve the status quo during the mediation process the plaintiffs sought in this court an injunction prohibiting Amtrak from implementing the promotional scheme outlined in the interim agreement. On December 15, 1976 I granted the plaintiffs' request for a temporary restraining order and on January 14, 1977 I issued a preliminary injunction against carrying out the challenged promotional scheme. On August 31, 1977 I modified the injunction so as to allow Amtrak to hold promotional examinations provided that the plaintiffs in this case were continued at their then present rank. It appears now that the National Mediation Board has arrived at a final determination of the proper representative of the Amtrak police for collective bargaining purposes. I am therefore dissolving the preliminary injunction and dismissing the case for lack of subject matter jurisdiction.

Railway labor disputes are governed by the provisions of the Railway Labor Act. 45 U.S.C. §151 *et seq.* The Act provides the exclusive procedure for settling those disputes, and divides all controversies into two classes, major disputes and minor disputes.

> [Major disputes relate] to disputes over the formation of collective bargaining agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to the assertion of rights claimed to have vested in the past.
>
> [Minor disputes contemplate] the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about formal change in terms or to create a new one. The dispute

> relates either to the meaning of a particular provision with reference to a specific situation or to an omitted case.

Elgin, Joliet & Eastern Railway Co. v. Burley, 325 U.S. 711, 723 (1945).

Minor disputes are subject to the exclusive primary jurisdiction of the National Railroad Adjustments Board (NRAB) and its system of compulsory binding arbitration. 45 U.S.C. §153. Neither party in these disputes is permitted to employ self-help and district courts have jurisdiction to enjoin the use of self-help in order to preserve the jurisdiction of the NRAB. *Brotherhood of Locomotive Engineers v. Louisville and Nashville Railroad Trainmen*, 373 U.S. 33 (1963) *Illinois Central R.R. Co. vs. Brotherhood of Railroad Trainmen*, 398 F.2d 973 (7th Cir. 1968).

The jurisdiction over major disputes under the Railway Labor Act lies in the National Mediation Board. While the dispute is before the National Mediation Board and is working its way through the various stages of conciliation provided under the Railway Labor Act neither party may alter the status quo. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969). During the pendancy of this voluntary arbitration process the district courts have jurisdiction to enjoin changes to preserve the status quo. *Goclowski v. Penn Central Transporation Co.*, No. 77-1248, slip op. at 9 n.6 (3rd Cir. Dec. 30, 1977).

My jurisdiction to enter an injunction in this case, therefore, depended on the necessity of preserving the status quo while the dispute was before the National Mediation Board. The dispute underlying this case is no longer before the National Mediation Board. That board conducted an election to determine the relevant employees' representative choice and based on the results of that election certified the Police Benevolent Association Long Island Railroad Police, Inc. as the duly authorized representative of Amtrak police officers below the rank of captain. That certification concluded the board's involvement with this dispute, and removed the basis

of my jurisdiction over this case. I am, therefore, by accompanying order, dissolving the injunction entered in this suit and dismissing the case for lack of subject matter jurisdiction.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT SLIMBOCK, *et al*	:	CIVIL ACTION
	:	
v.	:	
	:	
NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK) and LOCAL 732, INTERNATIONAL BROTHERHOOD OF TEAMSTERS	:	NO. 76-3840
	:	
MICHAEL AMICO, *et al*	:	CIVIL ACTION
	:	
v.	:	
	:	
NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK) and LOCAL 732, INTERNATIONAL BROTHERHOOD OF TEAMSTERS	:	NO. 77-3133

ORDER

AND NOW, this 27th day of April, 1978 it is hereby

ORDERED and DECREED that the preliminary injunction entered in this case be and the same is hereby dissolved and shall have no further force or effect.

It is FURTHER ORDERED that the above captioned cases be and the same are hereby DISMISSED for lack of subject matter jurisdiction.

BY THE COURT:

_____

JOSEPH L. McGLYNN, JR., J.

Supreme Court, U.S.
FILED
AUG 24 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-155

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1987

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK),

Petitioner

v.

LIEUTENANT THOMAS CUMMINGS, *et al.*,

Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Alexander A. Di Santi*
John M. Gallagher, Jr.
RICHARD, DI SANTI, HAMILTON, GALLAGHER & PAUL
25 West Second Street
P.O. Box 900
Media, Pennsylvania 19063
(215) 565-4600
Counsel for Respondents

**Counsel of Record*

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

QUESTIONS PRESENTED

Do state courts have jurisdiction to award money damages to railroad employees for breach of promises which were made to them by the railroad while they were employed elsewhere and which induced them to leave their previous employment and become employees of the railroad?

Does the Railroad Adjustment Board's denial of a grievance seeking specific performance of such promises, on the ground that it was improper for the railroad to extend them because they were in conflict with a collective bargaining agreement governing the railroad, preclude a state court from awarding money damages to the individuals harmed by the railroad's breach of such promises?

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NO. 87-155

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1987

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK),

Petitioner

v.

LIEUTENANT THOMAS CUMMINGS, *et al.*,

Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

The Respondents, Lieutenant Thomas Cummings, Lieutenant John Gallagher, Lieutenant Ronald Stachowski, Lieutenant William Boland, Lieutenant Stephen McGovern, Lieutenant John Ryan, Lieutenant Kurt Kemmessies, Lieutenant Michael Amico, Sergeant Neville Booth, Lieutenant Michael Serfess, Lieutenant Lawrence Clark, Lieutenant John Riggin, Lieutenant Harold Plude, Lieutenant Robert Slimbock, Lieutenant Harry Halbe, Lieutenant John Griffin, Sergeant Vaughn Carver, Sergeant Charles Yager, Sergeant Gerald Adams, Sergeant Stephen Warner, Sergeant Carl Gustafson, Sergeant

Richard Yost, Sergeant Robert Crowley, Sergeant Frank Rapinesi and Sergeant Robert Coulson, respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the opinion of the Pennsylvania Supreme Court in this case.[1]

COUNTER-STATEMENT OF THE CASE

Respondents instituted a simple breach of contract action against Amtrak in the Court of Common Pleas of Delaware County, Pennsylvania. Following trial, verdicts were rendered for Respondents in which the trial court determined that Amtrak had entered into individual employment contracts with each of the Respondents, that it had breached those contracts, and that as a result Respondents had sustained losses in the aggregate amount of approximately $800,000.00

Amtrak was created by the Rail Passenger Service Act[2] of 1970. In 1976, in connection with the exercise by Conrail of its statutory option[3] to purchase properties from the trustees of the bankrupt Penn Central Railroad, Amtrak assumed responsibility for operating and maintaining passenger service on those properties. It found itself with a sudden and immediate need for an appropriate railroad police force, including supervisory officers.

There were two pools of potential supervisory police personnel, the first comprised of individuals employed by railroads whose operations had been assumed by Amtrak and the second comprised of individuals outside the railroad industry.

Congress provided in the Regional Rail Reorganization Act of 1973, 45 U.S.C. §701 et seq., that rank-and-file employees who transferred to Amtrak from other rail carriers would be deemed covered by the collective bargaining agreements in effect on the railroad properties from which they transferred. In the case of Amtrak's railroad police, the governing collective

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1. The titles preceding the names of the Respondents represent the ranks promised to them and held by them before they were demoted by Amtrak.

2. 45 U.S.C. §501 *et seq*.

3. The option was provided in the Regional Rail Reorganization Act of 1973, 45 U.S.C. §701 *et seq*.

bargaining agreement was the one negotiated between Amtrak's remote predecessor, the Penn Central Transportation Company, and the Teamsters Union. It provided for the supervisory ranks of lieutenant and sergeant to be filled through a promotional scheme which gave decisive weight to seniority among competing employees who established their eligibility for promotion by passing a simple pass-fail examination.

Respondents held prestigious positions in law enforcement outside the railroad industry[4]. The testimony before the trial court demonstrated that they were recruited and hired by Amtrak personnel who were themselves advised by Amtrak that special arrangements had been made to bypass the promotional scheme in the governing collective bargaining agreement for the purpose of hiring the initial complement of lieutenants and sergeants. The Amtrak recruiters who solicited the Respondents as lieutenants and sergeants promised them permanent positions in these offices, subject only to good behavior. Those among the Respondents who inquired about any applicable collective bargaining agreement were told, as the Amtrak recruiters had themselves been advised, that special arrangements had been made to permit them to be hired as lieutenants and sergeants.

Respondents terminated their previous positions and gave up significant benefits attendant thereto in reliance upon the employment offers extended by Amtrak. They began working for Amtrak in the supervisory positions for which they were hired by it. A few months after being hired, Respondents were informed by Amtrak that, contrary to their individual contracts of hire, their eligibility for the supervisory positions they occupied would be determined by a promotional examination to be conducted in accordance with the governing collective bargaining agreement. All of the patrolmen who had joined Amtrak by transferring from another rail carrier brought with them the seniority they had acquired with that other rail carrier,

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4. For example, Respondent Amico had been a special agent for the Federal Bureau of Investigation. Respondent Yost was in charge of security for the DuPont Company in Delaware. Respondent Plude was on the list for promotion to captain in the New York City Police Department.

so that they all had seniority greater than Respondents. Learning that by the terms of the Teamsters-Penn Central collective bargaining agreement any patrolmen who passed the test would be promoted before them, Respondents recognized the futility of participating in that promotional scheme.[5] The promotional exam was temporarily delayed by litigation instituted by Respondents in the United States District Court for the Eastern District of Pennsylvania.[6] Eventually, however, Respondents, who refused to participate in the examination, were notified they would be demoted on May 18, 1978. Respondents then instituted a separate action in the United States District Court for the Eastern District of Pennsylvania at No. 78-1662, in which they sought to enjoin Amtrak from demoting them. Judge McGlynn on May 16, 1978 dismissed Respondents' Complaint on the basis that their right to occupy the supervisory positions they held represented a "minor dispute" within the exclusive jurisdiction of the RAB. Respondents were then in fact demoted from the supervisory offices they occupied to the rank of patrolman. Respondents thus found themselves in the untenable position of being suddenly made subordinate to officers whom

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5. When the test was ultimately given, more than enough patrolmen passed it than were necessary to fill all of the promotional positions available, establishing that Respondents had in fact no chance to successfully compete with them for the promotional positions.

6. In this litigation, *Slimbock v. National Passenger Corp.*, No. 76-3840, Judge McGlynn issued an injunction in December, 1976 prohibiting Amtrak from implementing the promotional scheme provided in the interim Teamsters-Penn Central collective bargaining agreement in order to preserve the status quo during the pendency of proceedings before the National Mediation Board brought by Respondents to challenge the status of the Teamsters as the collective bargaining representative for the Amtrak Police. Those proceedings culminated in the decertification of the Teamsters as the collective bargaining representative, following which a representation election was conducted which resulted in the Patrolman's Benevolent Association being certified as the bargaining representative. In the election, it had defeated both the Teamsters and the Amtrak Police Association, a labor organization sponsored mainly by Respondents. The Mediation Board's certification terminated the injunction jurisdiction of the District Court, and Judge McGlynn on April 27, 1978 entered an Order dissolving the injunction and dismissing the case for lack of subject matter jurisdiction.

they had supervised for approximately two years and who had no supervisory experience whatever.

Respondents then initiated grievances pursuant to the collective bargaining agreement in which, as ultimately noted by the National Railroad Adjustment Board (hereinafter RAB),

> "[Respondents] claim[ed] entitlement to reinstatement into the supervisory positions which they formerly held, with full reimbursement for all back pay that they have lost as a consequence of their demotion."

The grievances ultimately were denied by the RAB.[7] In denying their grievances and refusing to reinstate Respondents to their supervisory positions, the RAB in no way questioned the validity of Respondents' individual contracts of hire with Amtrak and did not address the responsibility of Amtrak toward Respondents occasioned by any breach of those individual contracts of hire. The RAB simply held that a carrier cannot properly enter into individual employment contracts which are inconsistent with the provisions of a collective bargaining agreement so that, in determining Respondents' claim to occupy the supervisory positions in question, the RAB was obliged to recognize that the rights of the bargaining unit membership established by the underlying collective bargaining agreement must take precedence over the rights of the Respondents under their individual contracts of hire.

The instant action had been instituted and was pending during the course of the proceedings before the RAB. It proceeded to a non-jury trial before the Honorable Joseph T. Labrum, Jr., Judge after the RAB had rendered its awards. Specifically finding that Amtrak had entered into contracts of employment with each of Respondents providing them with permanent supervisory positions terminable only for just cause and that Amtrak had breached each of those contracts of

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7. For reasons not difficult to comprehend, the Patrolman's Benevolent Association, the union then representing the Amtrak police force, refused to represent Respondents before the RAB.

employment by demoting Respondents, Judge Labrum entered verdicts for the Respondents and against Amtrak.

In post-trial exceptions to the verdict, Amtrak for the first time asserted that the case at bar was not within the subject matter jurisdiction of the state court. As a result, Judge Labrum entered judgment n.o.v. in favor of Amtrak.

Following affirmance of the trial court's judgment by a three-judge panel of the Pennsylvania Superior Court, the case at bar proceeded before the Pennsylvania Supreme Court which, sitting *en banc*, unanimously reversed the order of the Superior Court and reinstated the verdicts in favor of Respondents.

REASONS WHY PETITION SHOULD BE DENIED

1. The decision below of the Pennsylvania Supreme Court did not impinge upon the exclusive jurisdiction of the Railroad Adjustment Board.

Respondents' claim to reinstatement to the supervisory positions occupied by them pursuant to their individual contracts of hire was concededly a matter within the jurisdiction of the RAB. This conclusion follows from the obvious fact that resolution of those claims required establishing the priority of their claims pursuant to their individual contracts of employment against the competing claims of the other members of the bargaining unit pursuant to the terms of the collective bargaining agreement. However, while the jurisdiction of the RAB is exclusive, it is not exhaustive.

In making its argument on this point, Petitioner fails to recognize the crucial distinction, recognized by this Court [*Belknap, Inc. v. Hale*, 463 U.S. 491 (1983); *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944)], between a claim seeking specific enforcement of an individual contract of employment inconsistent with a collective bargaining agreement (which would incidentally impact adversely upon the competing rights of other employees within the bargaining unit as provided in the collective bargaining agreement) and a claim seeking only money damages for the financial loss suffered by the employee as a

result of his employer's breach of the terms of his individual contract of employment. The federal interest in reducing friction in the railroad industry centers upon disputes which require interpretation of a collective bargaining agreement, where their resolution affects and governs future relations between the parties and serves as precedent in construing other collective bargaining agreements. *United Pacific R.R. v. Sheehan*, 439 U.S. 98, 95 (1978); *Slocum v. Delaware, Lackawanna & Western R.R.*, 339 U.S. 239, 242 (1950). To further implement this interest, Congress created the RAB and entrusted it with jurisdiction of such disputes. As stated in *Slocum*, 339 U.S. at 243:

> "The act . . . represents a considered effort on the part of Congress to provide effective and desirable administrative remedies for adjustment of railroad-employee disputes growing out of the interpretation of existing [collective bargaining] agreements. The Adjustment Board is well equipped to exercise its congressionally imposed functions. Its members understand railroad problems and speak the railroad jargon. . . . Precedents established by it . . . provide opportunities for a desirable degree of uniformity in the interpretation of agreements throughout the nation's railway systems."

To the same effect, see *Pennsylvania R.R. v. Day*, 360 U.S. 548, 551 (1959).

Analogous to *Belknap, Inc. v. Hale, supra*, at n.13, the Pennsylvania courts could not, without interfering with the exclusive jurisdiction of the RAB, mandate specific performance of the individual contracts of employment made with Respondents by granting injunctive relief requiring reinstatement to their supervisory positions. The relief granted to Respondents, however, in the form of simple money damages, in no way involves interpretation of the collective bargaining agreement, in no way impacts upon any present or future relations between the railroad and its employees, and in no sense interferes with the federal interest in promoting uniformity in the interpretation of collective bargaining agreements and preserving the

integrity of the railroad system which prompted enactment of the Railway Labor Act.

Respondent's entitlement to compensatory damages for the losses suffered by them by virtue of Amtrak's breach of their individual contracts of employment is completely separate and apart from those issues within the exclusive jurisdiction of the RAB, "and does not involve questions of future relations between the railroad and its other employees". *Slocum*, 339 U.S. at 244.[8] As stated analogously by this Court in *J.I. Case v. NLRB*, arising under the National Labor Relations Act and involving the National Labor Relations Board:

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8. Amtrak's quotation from *Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711, 723 (1945) that the jurisdiction of the RAB extends to any claim "founded upon some incident of the employment relationship," including those "independent of a collective agreement," must be read in the factual and historical context of that case. The issue there was in no way related to the question here involved, but rather concerned the extent of a collective bargaining representative's authority to take action binding its members without their consent. Justice Rutledge painted the difference between a "major dispute" and a "minor dispute" in broad brushstrokes in this context, indicating that in the former case, involving the negotiation and formation of collective bargaining agreements, the representative *ipso facto* possessed authority from its individual members. His opinion placed all other disputes in the category of "minor disputes," involving the resolution of rights already accrued, and held that the bargaining representative needed authorization from the employees involved to compromise such disputes. No question of the jurisdictional dichotomy between courts and the RAB was involved in that case and the Court was entirely unconcerned with any such jurisdictional question, for at the time *Elgin* was decided, it was not established that the RAB had exclusive jurisdiction which would operate to deprive a court of jurisdiction. To the contrary, *Slocum v. Delaware, Lackawana & Western R.R.* was not decided until 1950. That Justice Rutledge, in defining "minor disputes", was totally unconcerned with the category of cases over which the RAB had jurisdiction, is apparent from the fact that his one illustration of a "minor dispute" independent of those covered by a collective bargaining agreement, *viz.* personal injuries, has never been within the jurisdiction of the RAB and has always been subject to jurisdiction of the courts, presently and since 1908 by virtue of the Federal Employers' Liability Act, 45 U.S.C. §51 *et seq.*

"The Board, of course, has no authority to adjudicate the validity or effect of . . . contracts except as to their effect on matters within its jurisdiction."

The award of damages sought by Respondents in the case at bar, based upon the losses suffered by them as a result of Amtrak's breach of its contractual promises to them while they were total strangers to Amtrak and before they became subject to the collective bargaining agreement which the RAB determined foreclosed specific performance of those promises, "differs from any remedy which the Board has power to provide." *Slocum v. Delaware, Lackawanna & Western R.R.*, 339 U.S. at 244. The law governing the resolution of Respondents' claims" is ordinary common law," and since "no interpretation of any provisions of any collective bargaining agreement is called into question . . . the Board's expertise need not be invoked." *Goclowski v. Penn Central Transp., Co.*, 571 F.2d 747, 756 (3rd Cir. 1977).

Amtrak's assertion that the Pennsylvania Supreme Court was without jurisdiction to determine the scope of jurisdiction of the RAB confuses the distinction between the jurisdiction of a state court and the federal pre-emption of state law. Once Amtrak asserted in its post-trial exceptions that the state courts lacked jurisdiction to adjudicate Respondents' claims because they were within the exclusive jurisdiction of the RAB, the state courts *were obliged* to address this question in order to determine whether the verdicts could stand. Amtrak's argument in essence is that the state courts were without jurisdiction to address a question which Amtrak presented to them for resolution in order to invalidate the verdicts against it. The jurisdiction of the RAB being exclusive as to matters within its province, the state courts were of necessity required to address this question to determine their own jurisdiction. Amtrak's reliance in advancing this argument on *Order of Railway Conductors of America v. Pitney*, 326 U.S. 561 (1945) is misplaced. That case involved a railroad reorganization in which an interpretation of two collective bargaining agreements was sought to resolve a

jurisdictional dispute between two accredited bargaining representatives. It was precisely because the resolution of the dispute required interpretation of the collective bargaining agreements that this Court held that the District Court, in the exercise of its equitable discretion, "should not have interpreted the contracts" but should have "exercised[d] equitable discretion to give [the RAB] the first opportunity to pass on the issue." 326 U.S. at 567[9]

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9. *Slocum v. Delaware, Lackawana & Western Railroad Co., supra,* applied the rationale of *Pitney* to deny to a state court jurisdiction to adjudicate a declaratory judgment action brought by a railroad to determine a jurisdictional dispute between two competing bargaining representatives under separate collective bargaining agreements. In *Slocum* this Court noted again, at 339 U.S. 242, that the dispute could not be resolved except by interpreting the two collective bargaining agreements, a function entrusted by Congress to the exclusive jurisdiction of the RAB. In so ruling, the Court was careful to note that the result was in no sense inconsistent with *Moore v. Illinois Central R.R.*, 312 U.S. 630 (1941), since "A common-law . . . action for wrongful discharge differs from any remedy which the Board has power to provide, and does not involve questions of future relations between the railroad and its other employees." While *Moore v. Illinois Central R.R. Co.*, holding that a discharged railroad employee had the option to either proceed before the RAB to seek reinstatement on the basis that his discharge was in violation of the collective bargaining agreement or to accept his termination and seek compensatory damages pursuant to local common law if he could demonstrate his discharge was wrongful, was overruled in *Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320 (1972), this is of no relevance to the case at bar. The ruling in *Andrews* was premised upon a recognition that the very concept of "wrongful discharge" implies some modification of the traditional common-law rule that employment contracts are terminable at will. Since it was conceded by the employee in *Andrews* that the only source of his right to continued employment was the collective bargaining agreement between his union and the carrier, his claim depended upon interpreting the collective bargaining agreement to provide him with a right to continued employment. It was under these circumstances that this Court declared that "His claim is therefore subject to the Act's requirement that it be submitted to the Board for adjustment."

Amtrak cites *Choate v. Louisville & Nashville R.R.*, 715 F.2d 369 (7th Cir. 1983), *Beers v. Southern Pacific Transp. Co.*, 703 F.2d 425 (9th Cir. 1983) and *Goclowski v. Penn Central Transp. Co.*, 571 F.2d 747 (3rd Cir. 1977) to support its argument that Respondents' claims are within the exclusive jurisdiction of the RAB. These cases are readily distinguishable from the case

2. The court below adjudicated claims separate and apart from those which the Railroad Adjustment Board had considered and rejected.

To the extent that Amtrak is arguing the preclusive effect of the RAB's determination, the resolution of this argument by this Court would be inappropriate. Rule 1030 of the Pennsylvania Rules of Civil Procedure requires that affirmative defenses, including specifically the defense of *res judicata*, be pleaded in a responsive pleading under the heading "New Matter," and Rule 1032 provides, with certain exceptions not here applicable,

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at bar. *Choate* and *Beers* involved actions for the intentional infliction of emotional distress following the discharge of the plaintiffs. In determining that their claims were within the exclusive jurisdiction of the RAB, the courts observed that their complaints concerning improper disciplinary procedures could be resolved only by reference to the provisions in the collective bargaining agreements governing discipline, and since their claims required interpretation of the collective bargaining agreements, under the rule announced in *Andrews v. Louisville & Nashville R.R.* they were within the exclusive jurisdiction of the RAB. *Goclowski*, on the other hand, delineates the line of separation between disputes involving the interpretation of provisions in a collective bargaining agreement, which are within the exclusive jurisdiction of the RAB, and disputes which can fairly and properly be resolved independent of the collective bargaining agreement, which remain subject to resolution in judicial forums based upon common law principles. The plaintiffs there sought to invalidate an agreement reached between their union and their carrier-employer on two separate grounds: first, that the agreement was an unauthorized extension of the collective bargaining agreement and, second, that it required ratification by the union membership in order to become effective. The District Court granted summary judgment against them on both claims on the basis that they were within the exclusive jurisdiction of the RAB. In reversing, the Court of Appeals determined that while the District Court was correct in its resolution of the first claim, which required scrutiny of the collective bargaining agreement and therefore deference to the expertise of the RAB in construing collective bargaining agreements, the District Court was required to resolve the second claim because:

> "[It] involves a simple contractual principle attacking the formation of a contract. The law applicable to such a claim is ordinary common law. Thus it appears that no interpretation of any provision of any collective bargaining agreement is called into question and that the Board's expertise need not be invoked. . . . [citing *Felter v. Southern Pacific Co.*, 359 U.S. 326 (1959)]" 571 F.2d at 756.

that a party waives all defenses which he does not properly plead. Citing those rules, the Pensylvania Supreme Court in *Posternack v. American Cas. Ins. Co. of Reading*, 421 Pa. 21, 218 A.2d 350, 351 (1966) ruled that "The . . . defense [of *res judicata*] . . . is affirmative in nature and must be pleaded, otherwise it is waived." To the same effect, see *Saitta v. Bankers Indemnity Ins. Co.*, 172 Pa.Super. 641, 95 A.2d 375, 377 (1953).

Amtrak never pleaded the defense of *res judicata*, and indeed even in its post-trial exceptions to the verdicts against it, it asserted only that the trial court lacked subject matter jurisdiction over the dispute. Amtrak never sought leave to amend its pleadings to assert the defense of *res judicata*, and under these circumstances consideration of Amtrak's argument on this point would be inappropriate. *Edelman v. California*, 344 U.S. 357 (1953).[10]

In any event, Amtrak's argument on this point ignores the fundamental difference between the claims asserted in this common law action by Respondents and the grievances they presented to the RAB. Their claims before the RAB were for specific enforcement of their individual contracts of employment to require their reinstatement to the supervisory positions from which they were demoted. In resolving Respondents' claims, the Board was obliged to measure any rights asserted by them arising from those individual contracts of employment against the competing rights to the promotional positions which the collective bargaining agreement afforded to other members of the bargaining unit. It was compelled to deny Respondents' grievances upon determining that their individual contracts conflicted with the collective bargaining agreement. The case at bar, however, is a simple common law action seeking compensatory damages for Amtrak's breach of its contractual promises to Respondents, the resolution of which required no reference

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10. While the opinions of the trial court and the Superior Court inappropriately considered the binding effect of the RAB's determination under these circumstances (A-19-20, A31 to Petition), the Pennsylvania Supreme Court appropriately ignored it. Its passing reference to the denial of Respondents' claims by the RAB was clearly directed to the jurisdictional question rather than the question of claim preclusion (A-6 to Petition).

whatever to the collective bargaining agreement. The significance of this distinction, ignored by Amtrak in its argument on this point, has of course been recognized by this Court. *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983); *J.I. Case v. NLRB*, 321 U.S. 332 (1944).

It is axiomatic that the "claim preclusion" branch of *res judicata* does not apply to claims which were beyond the jurisdiction of the original forum. Restatement, Judgments 2d §§26(1)(c) and 83(1). As stated in Comment g to §83, analyzing the question of claim preclusion as applied to determinations made by administrative agencies:

> ". . . preclusion is inapplicable to that part of a claim that is a possible basis for a second action where 'the plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the competency of the [tribunal]. . . ."

While the RAB has jurisdiction to award money damages in the form of compensatory back pay if and when it determines that the discharge, suspension or demotion of an employee was in violation of the terms of a collective bargaining agreement, it has no jurisdiction to consider claims arising totally apart from the collective bargaining agreement and founded upon common law principles. *Slocum v. Delaware, Lackawanna & Western R.R.*, 339 U.S. at 244. Indeed, its expertise does not extend and is irrelevant to the issues presented by the instant action, the resolution of which required reference to local common law principles. *Goclowski v. Penn Central Transp. Co.*, 571 F.2d at 756.

In determining the Respondents' grievances, the RAB did not even have occasion to address any of the three issues which were integral to Respondents' claims for breach of contract under the common law of Pennsylvania, *viz.* whether Amtrak did in fact enter into individual contracts of employment with Respondents, whether it breached those contracts, and whether Respondents suffered damages as a result. Those issues were of no concern to the RAB in the exercise of its jurisdiction.

Accordingly, the "issue preclusion" branch of *res judicata* is equally unavailing to Amtrak. Restatement, Judgments §27.

3. The test for pre-emption applied by the Pennsylvania Supreme Court was consistent with that announced in Allis-Chalmers v. Lueck.

It should first be observed that Amtrak is arguing that the test for pre-emption applied in *Allis-Chalmers v. Lueck, 471 U.S. 202 (1985)* controls in the case at bar for the first time in its Petition for a Writ of Certiorari. It never cited to the Pennsylvania Supreme Court that case or the test it applied. Amtrak's argument on this issue is therefore inappropriate. *Illinois v. Gates*, 416 U.S. 213, 218-22 (1983).

Assuming it were appropriate to consider the question, the pre-emption test applied by the Pennsylvania Supreme Court was consistent with the test applied in *Allis-Chalmers v. Lueck*. In that case, this Court determined that if an element of a claim under local law requires consideration and interpretation of the terms of a collective bargaining agreement, it is pre-empted by Section 301 of the Labor Management Relations Act, 29 U.S.C. §185(a). The claim there involved, asserted under the common law of Wisconsin against the plaintiff's employer for bad faith in the handling of disability benefits, was held to be pre-empted by §301. In making that determination, this Court embarked upon a detailed analysis of that tort as developed by the Wisconsin courts to determine that it could not be established under Wisconsin law except by reference to the contractual relationship between the promisor-insurer and the promisee-insured. As such, the nature of the tort was "tightly bound with questions of contract interpretation . . .", since "The parties' agreement as to the manner in which a benefit claim would be handled will necessarily be relevant to any allegation that the claim was handled in a dilatory manner." Because the insurance provision involved in that case was contained in a collective bargaining agreement, this Court observed that unless federal common law governed the resolution of the plaintiffs' claim, the meaning of

the insurance provision in the collective bargaining agreement would be subject to varying interpretations according to the common law involved and would thus "frustrate the federal scheme" favoring uniformity in the interpretation of collective bargaining agreements. It was only after undertaking this scrutiny of the nature of the tort under the common law of Wisconsin that this Court determined that the claim was "inextricably intertwined with consideration of the terms of the labor contract" and "substantially dependent" upon anaylsis of its terms so as to be pre-empted by §301.

Concededly, the Pennsylvania Supreme Court did not discuss *Allis-Chalmers v. Lueck*,because Amtrak never cited that case to it. In asserting that the test for pre-emption applied by the Pennsylvania Supreme Court contravened the test announced in *Allis-Chalmers v. Lueck*, Amtrak ignores the specific determination made by the Pennsylvania Supreme Court that:

> "These contracts are separate from the collective bargaining agreement and do not affect it. In spite of Amtrak's breach of Appellants' individual contracts, the collective bargaining agreement still defines the employment relationship. In fact, we see no way that this claim would 'impair federal superintendence.' " (A-11-12 to Petition for Certiorari.)

In *Anderson v. Ford Motor Co.*, 803 F.2d 953, 956 (8th Cir. 1986) the court, in applying the pre-emption test announced in *Allis-Chalmers v. Lueck*, echoed the Pennsylvania Supreme Court in the case at bar in concluding that:

> "Conversely, however, state rules that proscribe conduct or establish rights and obligations independent of a labor contract are outside the pre-emptive scope of §301."[11]

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11. The case at bar, it is respectfully submitted, would clearly not be pre-empted even if the standard for pre-emption applied in *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367, 1369-70 (9th Cir.), *cert. den'd* 439 U.S. 930 (1978) were applied. Thus, Respondents' claims clearly are lacking a "not insubstantial" or "arguable" relationship to the collective bargaining agreement.

In the case at bar, Amtrak sought out the Respondents and solicited them with promises of permanent supervisory positions, promises which it could not fulfill because they conflicted with the terms of a collective bargaining agreement by which it was bound but to which Respondents were total strangers. The RAB specifically determined that Amtrak could not properly extend such promises because of the conflicting terms in the collective bargaining agreement, and it has been judicially determined that Amtrak did in fact extend them. Respondents' claims are for compensatory damages occasioned by Amtrak's breach of those promises. Amtrak is thus placed in the anomalous position of arguing that Respondents' claims based upon Amtrak's contractual promises to them must be resolved by the very terms of the collective bargaining agreement which served to render Amtrak's conduct improper. This argument is not even remotely related to the rulings of this Court in *Allis-Chalmers v. Lueck* or *Andrews v. Louisville & Nashville R.R.* As clearly appears from the verdicts entered by the trial court and approved by the Pennsylvania Supreme Court, Respondents' entitlement to damages for breach of contract under the common law of Pennsylvania required only a showing that Amtrak extended contractual promises to them, that it breached those promises, and that as a result Respondents suffered damages. No reference whatever to the collective bargaining agreement was necessary or appropriate for the resolution of Respondents' claims. Amtrak attempts to assert the collective bargaining agreement, which was the precise factor rendering improper its conduct in extending promises inconsistent therewith to Respondents, to bar Respondents' claims based upon its breach of those promises. This agrument would render the studied analysis by this Court in *Allis-Chalmers v. Lueck*, demonstrating that under the common law of Wisconsin the plaintiffs' claims could not be established without reference to the collective bargaining agreement and its interpretation, a totally useless exercise.

4. In determining that the individual contracts of employment extended to Respondents by Amtrak were separate from the collective bargaining agreement and were thus "outside of the collective bargaining agreement's scope" and "do not affect it," the Pennsylvania Supreme Court correctly relied upon *Belknap, Inc. v. Hale* to support the viability of Respondents' claims under the common law of Pennsylvania.

An obvious concern to the Pennsylvania Supreme Court was to insure that the relief afforded to Respondents not conflict with the determination made of Respondents' grievances by the RAB or with any other question of concern to the RAB. In making this determination, *Belknap, Inc. v. Hale* was by analogy appropriate. In that case, as here, workers were offered and accepted permanent positions of employment. There, as here, the workers were subsequently removed from those positions. In *Belknap*, the striking workers' claim to the jobs would be paramount to those of the replacement workers if the strike was in response to an unfair labor practice committed by the employer. An unfair labor practice charge brought by the striking workers against the employer was in fact settled pursuant to an agreement between the employer and the union representing the striking workers which required the employer to reinstate the striking workers. In permitting the assertion of common law actions for damages based upon the employer's breach of its individual contracts of employment with the replacement workers, this Court observed that a critical inquiry was "Whether the controversy presented to the state court is identical with that which could be presented to the Board."

There, as here, the employer argued that its agreement with the union insulated it from the claims asserted under local common law for breach of contract. In language particularly appropriate to the case at bar, this Court observed at 463 U.S. 507 that:

> "[The employer argues] that the contracts are not only not specifically enforceable but also may be breached free from liability for damages. We need not address the former issue

> — the issue of specific performance — since the Respondents ask only damages. As to the damages issue, as we have said above, such an argument was rejected in *J.I. Case*."

In language again particularly appropriate to the case at bar, this Court observed that while the state court could not mandate specific performance of the contracts of employment made with the replacement workers, since such a remedy would interfere with the competing rights of the striking workers and thus impinge upon the jurisdiction of the NLRB:

> ". . . even had there been no settlement and the Board had ordered reinstatement of what it held to be unfair labor practice strikers, the suit for damages for breach of contract could still be maintained without in any way prejudicing the jurisdiction of the Board. . . . The interests of the Board and the NLRA, on the one hand, and the interest of the state in providing a remedy to its citizens for breach of contract, on the other, are 'discrete' concerns. . ." 463 U.S. at 512.

The principles announced in *Belknap v. Hale* were obviously appropriate for consideration by the Pennsylvania Supreme Court in determining whether an award of damages to Respondents would in any sense conflict with the RAB's determination that they were not entitled to specific performance of Amtrak's contractual promises of permanent supervisory positions in the face of the competing rights to occupy such positions which the collective bargaining agreement afforded to other members of the bargaining unit.

Amtrak argues that the Pennsylvania Supreme Court incorrectly resolved the issue left open in *Caterpillar v. Williams*, ___ U.S. ___, 107 S.Ct. 2425 (1987), an issue which it asserts is governed in its favor by *J.I. Case v. NLRB*. In addressing this argument, it is appropriate to recognize the significant distinction between the case at bar, on the one hand, and *Caterpillar* and *J.I. Case* on the other. In the case at bar, the individual contracts of employment were made with Respondents while they were total strangers to any employment relationship with

Amtrak and concerned hiring for positions within a bargaining unit covered by a collective bargaining agreement. Amtrak's conduct was wrongful toward Respondents precisely by virtue of the fact that it extended to them contractual promises which it was legally prohibited from fulfilling from the very moment those contractual promises were extended because of the conflicting provisions of the *pre-existing* collective bargaining agreement to which it was bound.

In both *Caterpillar* and *J.I. Case*, on the other hand, the individual contracts of employment were made in connection with positions not within a bargaining unit and not covered by any collective bargaining agreement. In *J.I. Case*, the contracts were entered prior to the formation of any collective bargaining agreement, while in *Caterpillar* the contracts were entered while the promisee-employees occupied managerial positions not covered by the collective bargaining agreement. In such a context, as observed by this Court in *Caterpillar v. Williams* at 107 S.Ct. 2432, an issue is raised whether by entering into the bargaining unit sometime thereafter, and thus becoming subject to a collective bargaining agreement with terms conflicting with their individual contracts, the employees waived their rights under the pre-existing individual employment contracts. In both *J.I. Case* and *Caterpillar* the contracts involved were in fact valid and enforceable when made, and an issue for consideration was their continued viability by virtue of the *subsequent* impact of the collective bargaining agreements, viz. whether the *subsequent* collective bargaining agreements superseded the individual contracts. That issue could not be resolved without reference to the collective bargaining agreement.

In *Caterpillar v. Williams*, the sole issue raised in the appeal to this Court was whether the plaintiffs' state court action was removable to the federal district court under the "complete pre-emption" exception under §301 to the general principle that the removability of a state court action is to be determined solely by reference to the plaintiff's Complaint. This Court's observation that it was intimating no views on the ultimate pre-emption issue was made in recognition of the fact that this issue was not before the Court in that its determination that the case was not

removable required resolution of the pre-emption issue in the first instance by the state court. This observation concerning the ultimate pre-emption question cannot fairly be read to imply any question concerning the continued viability of state court actions which have a basis completely independent of the collective bargaining agreement. This was made clear by the statement there at 107 S.Ct. 2431-32, that:

> ". . .[in] *J.I. Case* the Court . . . held:
>
> > 'Individual contracts cannot subtract from collective ones, and whether under some circumstances they may *add* to them in matters covered by the collective bargain, we leave to be determined by appropriate forums under the law of contracts applicable. . . .'
>
> . . . individual employment contracts are not inevitably superseded by any *subsequent* collective bargaining agreement covering an individual employee, and claims based upon them may arise under state law. *Caterpillar's basic error is its failure to recognize that a plaintiff covered by a collective-bargaining agreement is permitted to assert legal rights independent of that agreement including state-law contract rights, so long as the contract relied upon is not a collective bargaining agreement.* See *Allis-Chalmers, supra*." (emphasis supplied)

5. There is no conflict among the circuit courts and the state courts on the issue presented by the case at bar.

In addressing the analysis of the various circuit court and state court opinions presented in Amtrak's Petition for Certiorari, it is perhaps most appropriate to begin by focusing on the issue presented by the case at bar. It does not involve claims asserted by individuals arising out of individual contractual promises made by their employer while they occupied positions not covered by an existing collective bargaining agreement, promises which were valid and enforceable when made, where the issue for resolution is whether they continue to be enforceable at a point in time when the employees subsequently accept

positions covered by the collective bargaining agreement. This was the issue presented by *Caterpillar v. Williams*.

The case at bar similarly does not involve the continued viability of individual contracts of employment in the face of a collective bargaining agreement subsequently negotiated by a bargaining representative designated to represent a bargaining unit of which the employee involved becomes a member, where the issue arises concerning a bargaining representative's authority to enter into collective bargaining agreements which adversely impact upon rights previously enjoyed by certain parties. This was the issue presented by *J.I. Case v. NLRB* and *Lewellyn v. Fleming*, 154 F.2d 211 (10th Cir.), *cert. den'd*, 329 U.S. 715 (1964).

The case at bar likewise does not involve the efficacy of individual contracts with an employer entered by employees while they are covered by a collective bargaining agreement. This requires consideration of the impact upon such contracts of the employees' participation in the employer's unfair labor practice in avoiding the bargaining representative and dealing directly with members of the bargaining unit.

The case at bar presents a claim arising out of contractual promises extended to Respondents by Amtrak at a point in time when they occupied positions of employment elsewhere and were not only not covered by Amtrak's collective bargaining agreement but total strangers to any employment relationship with it. Respondents' claims are based upon contractual promises extended to them under circumstances where from the very moment the promises were made by Amtrak it was prohibited from fulfilling them by virtue of the conflicting provisions in a controlling collective bargaining agreement.

Finally, the case at bar does not present a claim for specific enforcement of Amtrak's contractual undertakings so as to entitle Respondents to occupy the supervisory positions promised them, the claim which was presented to the RAB and which involves consideration of the priority between the Respondents' rights to those positions and the competing rights of other members of the bargaining unit as provided in the governing

collective bargaining agreement. The case at bar presents a simple claim for money damages to compensate Respondents for the significant financial losses sustained by them by virtue of their reliance upon and Amtrak's breach of the contractual promises it extended to them under the circumstances of this case.[12]

Amtrak argues that the Writ of Certiorari which it seeks should be granted to resolve a conflict among the circuit courts and state supreme courts on the issue presented by this case. As supportive of its position, it cites *Eitmann v. New Orleans Public Service*, 730 F.2d 359 (5th Cir.), *cert. den'd*, 469 U.S. 1018 (1984); *McKinney v. Int'l Ass'n of Machinists*, 624 F.2d 745 (6th Cir. 1980); and *Lewellyn v. Fleming*, 154 F.2d 211 (10th Cir.), *cert. den'd*, 329 U.S. 715 (1946). Amtrak asserts that these cases are in conflict with *Anderson v. Ford Motor Co.*, 803 F.2d 953 (8th Cir. 1986); *Varnum v. Nu-Car*, 804 F.2d 638 (11th Cir. 1986); and *Bubbel v. Wien Air Alaska, Inc.*, 682 P.2d 374 (Sup. Ct. Alaska 1984).

Respondents submit that even considering the question presented by the case at bar in the broadest possible sense, the decisions of this Court in *Allis-Chalmers v. Lueck* and *Belknap v. Hale* have resolved it in clear terms. The three cases which Amtrak acknowledges are consistent with the decision of the Pennsylvania Supreme Court in the case at bar were all decided subsequent to *Belknap v. Hale*, while of the three cases which Amtrak argues are inconsistent, only *Eitmann v. New Orleans Public Service* was decided subsequent to *Belknap*. That case, however, is readily distinguishable from the case at bar and is in no sense inconsistent with *Anderson v. Ford Motor Co.*, *Varnum v. Nu-Car* or *Bubbel v. Wien Air Alaska*.

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12. While the Pennsylvania Supreme Court in its opinion inadvertently made a passing reference to Respondents' claims being "for breach of individual employment contracts *and misrepresentation*" [A-2 to Petition], Respondents in their Complaint filed in state court sought relief only for breach of contract, and the verdicts of the trial court and its opinion clearly demonstrate that it awarded relief solely for breach of contract (A-28-36 to Petition).

In *Eitmann v. New Orleans Public Service*, the plaintiff's complaint alleged that at the time he was hired by the defendant as an overhead linesman, he was advised that due to the hazardous nature of their work, overhead linesmen received full pay during any period of partial or total disability until retirement. The plaintiff further averred that after being disabled as a result of an injury on the job he was ultimately discharged. The governing collective bargaining agreement had a grievance procedure which culminated in binding arbitration to determine whether discharges were "for cause". The plaintiff did not follow the grievance procedure but instead filed suit in state court asserting a common law cause of action. The case was removed to the federal district court which entered summary judgment for the defendant. The plaintiff's complaint did not allege that the governing past practice between the defendant employer and its overhead linemen employees was not in fact as represented to him when he was hired. In affirming the entry of summary judgment the court noted that to the extent the plaintiff's complaint was based upon the past practice, *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) makes clear that such past practices, comprising the "industrial common law" on matters not explicitly covered by the collective bargaining agreement, are nonetheless part of the collective bargaining agreement and thus enforceable pursuant to its grievance procedure. As such, the court declared:

> "Where, as here, an employee who is covered by a collective bargaining agreement seeks to redress a grievance subject to its terms, and seeks a remedy awardable by the arbitrator, we think it is clear that his avenue lies in the procedure provided by the collective bargaining agreement."

Because the plaintiff in *Eitmann v. New Orleans Public Service* was not asserting that the "past practice" was contrary to the representations made to him by the defendant-employer, his claim was based upon and governed by the collective bargaining agreement. It was precisely for this reason that a claim based upon common law was inappropriate, as observed by the

Eleventh Circuit, in distinguishing *Eitmann* in its opinion in *Varnum v. Nu-Car Carriers, Inc.*

In addition, it should be pointed out that neither *McKinney v. Int'l Ass'n of Machinists* nor *Lewellyn v. Fleming* is inconsistent with the decision of the Pennsylvania Supreme Court in the case at bar or with the cases which Amtrak acknowledges support Respondents' position. In *McKinney v. Int'l Ass'n of Machinists*, the plaintiffs sought *injunctive* relief to enforce their individual contracts of employment at the expense of other members of the bargaining unit who were promoted pursuant to the collective bargaining agreement. It thus presented the same issue which was properly presented to and resolved by the RAB in the case at bar.[13]

Lewellyn v. Fleming, on the other hand, is not even remotely relevant to the issue presented by the case at bar. There the plaintiff relied upon a past practice which prevailed for many years from the time he was employed until 1938 when, pursuant to the Railway Labor Act, his railroad employer entered into a collective bargaining agreement with a union representing a bargaining unit of which he was a member. The collective bargaining agreement provided for a change in the past practice. There was no issue in that case of any contractual promise extended by the employer to the plaintiff in connection with his employment, and the case raised only the authority of a bargaining representative to negotiate changes in terms of employment, whether established by past practice or prior collective bargaining agreements. The court simply recognized a bargaining agent's authority to make "contracts which may have unfavorable effects on some members of the craft

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13. The rational for this category of cases is seen in *Brown v. American Airlines, Inc.*, 593 F.2d 652 (5th Cir. 1979) where the court observed, in connection with the plaintiff's claim for specific enforcement of his agreement with the carrier:

> "If the agreement were enforced, it would affect the rights of other employees under the collective bargaining agreement. To allow Brown to return to his former position without loss of seniority would necessarily change the status of those currently working at that job. Thus, the settlement of this dispute seriously implicates the CBA."

represented."[14]

There is thus no conflict among the decisions of the circuit courts and state courts which would be resolved by a decision of this Court in the case at bar.

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14. Amtrak in its Petition also avers that in *Bale v. General Telephone Co.*, 795 F.2d 755 (9th Cir. 1986) the Ninth Circuit arrived at a conclusion opposite to that in *Williams v. Caterpillar Tractor Co.*, 786 F.2d 928 (9th Cir. 1986) *aff'd* U.S. , 107 S. Ct. 2425 (1987). In making this assertion, Amtrak ignores a crucial distinction between the cases. *Williams v. Caterpillar Tractor Co.*, like the case at bar, involved a simple common law action for breach of contract. In *Bale v. General Telephone Co.*, on the other hand, the only claims before the Ninth Circuit were common law claims of fraud and negligent misrepresentation arising out of promises allegedly extended to the plaintiffs by their employer at the time of hire which were in conflict with terms of the collective bargaining agreement. It was precisely because the court determined that to prevail the plaintiffs would be compelled to demonstrate that the collective bargaining agreement, properly interpreted, "differed significantly from the individual employment contracts they believed they had made" that it concluded that their claims were therefore "substantially dependent upon analysis of the terms" of the collective bargaining agreement and thus pre-empted by §301, pursuant to the rationale of *Allis-Chalmers v. Lueck*.

While the Eighth Circuit in *Anderson v. Ford Motor Co.* perceived some conflict between its holding and that in *Bale v. General Telephone Co.*, there is in fact a significant distinction between the two cases. While both cases involved tortious conduct by the employer, in *Anderson v. Ford Motor Co.* the misrepresentation asserted by the plaintiffs was not a promise conflicting with the terms of the collective bargaining agreement. The collective bargaining agreement concededly established a preferential hiring list. The plaintiffs, as former employees of Ford, were admittedly aware of this provision. The misrepresentation involved a statement of fact by the employer independent of the collective bargaining agreement, that the preferential hiring list had been exhausted, when in fact it had not. No interpretation of the collective bargaining agreement was necessary to prove this misrepresentation, unlike the one asserted in *Bale*. Assuming some conflict between *Anderson v. Ford Motor Co.* and *Bale v. General Telephone Co.* however, the case at bar would not be an appropriate vehicle to resolve it, since Respondents here did not assert or obtain relief for misrepresentation, a tort under Pennsylvania law. They asserted and obtained relief solely for breach of contract.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania be denied.

Respectfully submitted,

Alexander A. Di Santi*
John M. Gallagher, Jr.
RICHARD, DI SANTI, HAMILTON,
GALLAGHER & PAUL
25 West Second Street
P.O. Box 900
Media, Pennsylvania 19063
(215) 565-4600
Counsel for Respondents

*Counsel of Record